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SUPREME COURT OF THE UNITED STATES	AUG 2 1969 MICHAEL BOBAY, JR. CLERK

OCTOBER TERM, 1969

NO. 36, ORIGINAL

THE STATE OF TEXAS,
Plaintiff
vs.
THE STATE OF LOUISIANA,
Defendant

BRIEF OF THE STATE OF TEXAS IN
SUPPORT OF THE SPECIAL MASTER'S
REPORT AND IN REPLY TO EXCEPTIONS
FILED BY THE STATE OF LOUISIANA

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BRIEF OF THE STATE OF TEXAS IN
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STATEMENT

This suit was instituted by the State of Texas for the purpose of establishing its rights as against the State of Louisiana to the jurisdiction over and ownership of the western half of the Sabine River¹ from the mouth of the River on the Gulf of Mexico to the 32nd degree of north latitude, and for a decree confirming the boundary of the two States in the middle of said stream.

¹The use of the term "Sabine River" or "Sabine" includes Sabine Pass and Sabine Lake. By their pleadings, the parties are in agreement that these streams form a continuous body of navigable water, and that for convenience they are referred to collectively as "Sabine River," unless otherwise noted.

The Honorable Robert Van Pelt, appointed by the Court as Special Master, after hearing the evidence and arguments of the parties, has filed his Report holding with Texas on the basic issues, to-wit:

1. That the western half of the Sabine was never a part of the State of Louisiana but was a part of the territory of the United States when on July 5, 1848, Congress gave consent for the State of Texas to extend its eastern boundary so as to include such area. (Special Master's Report, 12-26).

2. That in addition to its title thus acquired from the United States, as a matter of law, Texas has established its eastern boundary in the geographic middle of the Sabine under the doctrine of prescription and acquiescence. (Special Master's Report, 27-30).

3. That the Sabine boundary between the two States, as a matter of law and by prescription and acquiescence, is the geographic middle of the stream rather than the thalweg center of a main navigable channel. (Special Master's Report, 31-34).

Louisiana has filed exceptions to the above findings of the Special Master together with a brief in support of its exceptions. Texas supports the above basic findings and all recommendations of the Special Master, with only one reservation and exception heretofore filed as to a portion of an incidental and independent conclusion relating to the ownership of three very small "islands" at the mouth of the main thread of the Sabine River (as distinguished from Sabine Lake and Pass) and one alleged four-acre "island" at the mouth of the Neches River. As to these alleged small "islands" west of the geographic middle of the Sabine, the Special Master concludes that they may be owned by Louisiana if it is hereafter shown that they existed as true

islands in 1812 and if Texas has not acquired title to them by prescription and acquiescence. Since the Report recommends that the Special Master be authorized to hear further evidence as to the ownership of these alleged islands, Texas suggests that the entire question of island ownership in the western half of the Sabine be reserved and again referred to the Special Master after the Court has determined whether it approves his findings and recommendations on the above basic and controlling issues as to the boundary line between the two States.

Texas has heretofore filed with the Court and the Special Master a brief entitled "Brief for the State of Texas in Support of Motion for Judgment", dated July 10, 1970, which consists of 54 pages plus a separately numbered 45 page Appendix. It will be hereinafter referred to as "Texas Brief" or "Tex. Br.", with frequent citations to more detailed arguments and documents which have been reproduced in its Appendix (Tex. Br. App.), so as not to repeat or reprint all of such arguments and documents in this Brief. All citations to pages in the Texas Brief and Appendix will refer to the reprinted copies filed in compliance with type sizes required by the Rules of the Supreme Court. The original printing in smaller type should be discarded.

The purpose of this Brief is to summarize and consolidate all arguments heretofore made in support of the Special Master's Report. Actually, the Report is so well annotated, both as to the law and the evidence, that very little is required to be said in its support. Therefore, a principal function of this Brief will be to reply to Louisiana's exceptions and its Brief in support of such exceptions.

ARGUMENT

I

THE SPECIAL MASTER CORRECTLY HELD AS A MATTER OF LAW THAT THE WESTERN HALF OF THE SABINE WAS NEVER A PART OF THE STATE OF LOUISIANA BUT WAS A PART OF THE TERRITORY OF THE UNITED STATES WHEN ON JULY 5, 1848, CONGRESS GAVE CONSENT FOR THE STATE OF TEXAS TO EXTEND ITS EASTERN BOUNDARY SO AS TO INCLUDE SUCH AREA. (In reply to Louisiana's Exception No. 1 and Point "A" of Louisiana's Brief.)

A. The area in controversy was part of the territory acquired by the United States from France under the Louisiana Purchase Treaty in 1803.

It is undisputed in this case that the area in controversy was acquired by the United States from France as part of the Louisiana Purchase in 1803. 8 Stat., 200. (Copied in Tex. Br., App., p. 1).

By this Purchase, the United States obtained from France a vast area of land between the Mississippi River and the Rocky Mountains, from which all or part of fifteen States have been carved.* The United States claimed that the western boundary of the Purchase was the Rio Grande and that it thus included the area which comprises the present State of Texas.* This

*JAMES K. HOSMER, HISTORY OF THE LOUISIANA PURCHASE (1902) 202.

*THOMAS JEFFERSON, THE LIMITS AND BOUNDS OF LOUISIANA (1804) 27-28, 31-32, published in DOCUMENTS RELATING TO THE PURCHASE AND EXPLORATION OF LOUISIANA (Houghton Mifflin Co., 1904); ADAMS, HISTORY OF THE UNITED STATES, II, 5-7, 298; CHANNING, HISTORY OF THE UNITED STATES, IV, 331-333; THOMAS M. MARSHALL, A HISTORY OF THE WESTERN BOUNDARY OF THE LOUISIANA PURCHASE. 1819-1841 (1914) 1-46.

is significant in the present controversy only to the extent that it explains why the United States limited the State of Louisiana to a western boundary in the middle of the Sabine River in 1812. The Nation was then and for seven years thereafter claiming the Province of Texas, and as hereinafter shown, it was the policy of the United States to fix mid-stream boundaries in navigable waters between States and territories. It was not until 1819 that the United States ceded to Spain the area west of the west bank of the Sabine, retaining as part of its territory the western half of the stream.

B. The area in controversy was never included within the boundaries of the State of Louisiana.

The area in controversy was included within the Territory of Orleans by Act of Congress in 1804 (2 Stat. 283) but was not included by Congress and the people of Louisiana within the boundaries of the State of Louisiana. The Territory of Orleans was created by Congress from that portion of the Louisiana Purchase lying west of the Mississippi River and south of the 33rd degree of north latitude. In this case, Louisiana admits that the west boundary of this Territory, from which the State of Louisiana was formed, "had not been established." From 1804 until 1819, the United States claimed that the Territory of Orleans embraced all of the lands between the Mississippi River and the Rio Grande, including all of the Province of Texas. Map 4 from Thomas M. Marshall's exhaustive work on the Louisiana Purchase is reproduced on page 16 of Texas' Brief in Support of Motion for Judgment. It shows Jefferson's final conception of the size of the

³ MILLER, TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES (1934) 3.

⁴ Defendant's Answer, p. 5.

⁵ See footnote 3, *supra*; MARSHALL, *Op. Cit. supra*, 13-16, 21-22, 55-60.

purchase. All lands depicted south of the 33rd degree of north latitude were included in the Territory of Orleans.

- (1) The Enabling Act of Congress, February 20, 1811, specifically limited the proposed State of Louisiana to a western boundary "along the middle of said [Sabine] river, including all islands to the thirty-second degree of latitude."
(2 Stat. 641)

Congress authorized the inhabitants of a certain portion of the Louisiana Purchase to form a government and seek admission as the State of Louisiana. The relevant portion of the Enabling Act specifically defined the area as to which such authority was granted, with the west boundary being fixed in the middle of the Sabine River, as follows:

"That the inhabitants of all *that part* of the territory or country ceded under the name of Louisiana . . . *contained within the following limits*, that is to say: beginning at the mouth of the river Sabine, thence by a line to be drawn *along the middle of the said river, including all islands to the thirty-second degree of latitude*; thence due north to the northernmost part of the thirty-third degree of north latitude; thence along the said parallel of latitude to the river Mississippi . . . be, and they are hereby authorized to form for themselves a constitution and state government . . ."

Louisiana does not deny the passage or the terms of this Enabling Act.

- (2) The Constitution of the State of Louisiana adopted on January 22, 1812, fixed its western boundary in the middle of the Sabine River, using substantially the same language as the Enabling Act.

¹Emphasis supplied unless otherwise noted. The Act is printed in full in Tex. Br. App., p. 3.

Pursuant to the authority granted by Congress, the inhabitants of this specifically defined area (which was carved out of the Territory) formed their government and adopted the State Constitution of Louisiana.* The Preamble of this Constitution fixed the western boundary of the State in the middle of the Sabine River, using substantially the same language as in the Enabling Act, as follows:

"We, the Representatives of the People of all *that part* of the Territory or country ceded under the name of Louisiana, by the treaty made at Paris, on the 30th day of April, 1803, between the United States and France, *contained in the following limits, to wit: beginning at the mouth of the river Sabine, thence by a line to be drawn along the middle of said river, including all its islands, to the thirty second degree of latitude—thence due north to the Northernmost part of the thirty third degree of north latitude*—thence along the said parallel of latitude to the river Mississippi—thence down the said river to the river Iberville, and from thence along the middle of the said river and lakes Maurepas and Pontchartrain to the Gulf of Mexico—thence bounded by the said Gulf of Mexico to the place of beginning, including all Islands within three leagues of the coast—in Convention Assembled . . . do ordain and establish the following constitution or form of government, and do mutually agree with each other to form ourselves into a free and independent State, by the name of the State of Louisiana."

*3 WEST, LOUISIANA STATUTES ANNOT., CONST. 511; Copied in Tex. Br. App., p. 4, and in Tex. Ex. C, p. 1.

"This is the same descriptive language as in the Enabling Act except for adding the word "its" before the word "islands" and a comma after such word. If the difference is of any relevance, obviously the Acts of Congress would control because it had exclusive power to admit a new State and "to dispose of . . . the Territory or other Property belonging to the United States . . ." Article IV, Sec. 3, CONSTITUTION OF THE UNITED STATES. *Alabama vs. Texas*, 347 U.S. 272 (1953).

A controlling point in this case is that the above constitutional boundary provision has never been amended by Louisiana, except for the addition on the east of a small portion of "West Florida." *Louisiana v. Mississippi*, 202 U.S. 1 (1906). As far as its western boundary in the middle of Sabine River is concerned, this constitutional provision is the existing law of the State of Louisiana.

Louisiana attempts to ignore this Congressional and Constitutional boundary limit in its Exceptions Brief (pp. 11-19) arguing that its western boundary was uncertain and to be later fixed by treaty with Spain. It copies a long debate in the House by Mr. Poindexter in which he makes this argument when the Enabling Act of 1811 was under consideration. What Louisiana overlooks is that, Section 2 of the bill then under debate and as passed by the House on January 15, 1811, provided for no fixed boundary on the west, merely describing the area of the proposed State to be that "now contained within the limits of the Territory of Orleans, except that part lying east of the river Iberville and a line to be drawn along the middle of the lakes Maurepas and Pontchartrain to the ocean" (La. Ex. A, 62). However, the Senate did not go along with any such uncertain western boundary for the State of Louisiana. It amended the bill to provide the definite and fixed western boundary provision which was finally enacted and that is now before the court in this case. (See copy of proceedings, Texas' Exhibit G, pp. 51-58).

In *Louisiana v. Mississippi*, *supra*, Louisiana cited the Constitution of 1812 boundary provision as the existing boundary of the State, together with the addition of the small area on the east consented to by Act of Congress on April 14, 1812, 2 Stat. 702. The Court quoted the 1812 constitutional boundary provision and

based its decision, in part, on that provision as containing the existing boundary limits of the State of Louisiana. See also *United States v. Louisiana, et al*, 363 U.S. 1, 66, 75-76 (1960).

- (3) The Act of Congress, April 8, 1812, admitting Louisiana as a State, repeats the same Sabine boundary (middle of the River) as in the Enabling Act of 1811 and in the Louisiana Constitution of 1812.

The relevant portion of the Act of Admission repeats the same middle of the Sabine River boundary as contained in the Enabling Act and in the Louisiana Constitution of 1812. (2 Stat. 701; Tex. Br. App., p. 5).

This Act not only reiterates that only "*that part of the territory . . . contained within the following limits*" was admitted, but adds a section which further confirms that a portion of the Territory of Orleans was omitted from the new State. Section 3 states "*that the new State, together with the residue of that portion of the country which was comprehended within the territory of Orleans . . . shall be one district . . .*" for the jurisdiction of a federal court created by the Act.

- (4) The mid-stream boundary of the State of Louisiana as fixed by Congress and the Constitution of Louisiana in 1812 was in accordance with the policy and law of the United States relating to navigable river boundaries between states and territories.

Louisiana's argument indicates that the State might question the reasonableness or intent of Congress in fixing its western boundary in the middle of the Sabine. While reasonableness and intent have little or no bearing in determining what Congress actually did in definite and unambiguous terms, it should be pointed out that the Congress was simply following established policy and law with reference to navigable water boun-

daries between states and territories. The middle of the stream is always followed, either by statute or by operation of law, except where prior treaties or agreements have fixed a different line. The Special Master has correctly held that establishment of "the Louisiana boundary in the middle of the Sabine River was clearly in accordance with the policy and law of the United States relating to river boundaries between States and territories, so that any present or future States would be treated equally with respect to common boundary streams." This policy has been recognized by the Supreme Court:

"[T]he United States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired territory, while under its sole dominion, as held for the ultimate benefit of future States, and so has refrained from making any disposal thereof, save in exceptional instances when impelled to particular disposals by some international duty or public exigency. It follows from this that disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926). See also *Shively v. Bowlly*, 152 U.S. 1, 49, 57-58 (1894).

The rule was also recognized and followed in *Louisiana v. Mississippi*, *supra*, p. 48, when speaking of the Mississippi River boundary established by Congress and the Louisiana Constitution of 1812. Although the Louisiana boundary limits on the east call only for the Mississippi River, and except for the mid-stream policy and law could have been interpreted to stop at the west bank of the River, the Court said, "Now to repeat, the boundary of Louisiana separating her from the State of Mississippi to the east is the thread of the

channel of the Mississippi River . . ." See also *Handly's Lessee v. Anthony*, 5 Wheat. 374, 379 (1820), in which Chief Justice Marshall wrote, "when a great river is the boundary between two nations or States, if the original property is in neither, and there be no convention about it, each holds to the middle of the stream."

There is no reason why the rule or the Act of Congress fixing Louisiana's western boundary in the middle of the Sabine should appear unusual to Louisiana, since all of its other water boundaries (Mississippi, Iberville, Amite, and Pearl Rivers, and Lakes Maurepas and Pontchartrain) go to the middle of the streams either by specific calls or by operation of the above stated rule of law. *Louisiana v. Mississippi, supra*; DOUGLAS, *Boundaries, Areas, etc. of the United States and the Several States*, GEOLOGICAL SURVEY BULLETIN 817 pp. 166-169 (1930).

When Louisiana was admitted as a State in 1812, the United States was claiming a vast area to the west, including all of Texas, and under the navigable river boundary policy and law then in effect it would have been more unusual if Congress had not limited Louisiana's western boundary to the middle of the Sabine. In any event, the geographical mid-stream boundary was what Congress specified, and it remains until this day the boundary as agreed to by the people of Louisiana in their Constitution of 1812.

Louisiana makes much of the fact that the United States followed a different policy on the Red River between Oklahoma and Texas. (La. Exceptions Brief, p. 37-38). The main distinction here is that the Red was held to be a non-navigable stream under which the United States retains title. Although it granted much of the north half of the river to Oklahoma tribes, the

United States still retains title to the south half of that stream. *Oklahoma v. Texas*, 258 U.S. 574 (1922).

- (5) Relinquishment by the United States of that portion of Texas lying west of the Sabine and retention of its title and jurisdiction over the western half of the Sabine River in the Treaty with Spain in 1819, did not result in an extension of the western boundary of Louisiana.

Louisiana bases its whole argument for a west bank boundary on a novel theory that the United States was "appearing on the part of the State of Louisiana," in negotiating the Treaty with Spain in 1819, or that by reason of such Treaty the western boundary of Louisiana was automatically eased over from the middle of the Sabine to the western bank of the stream.

*The United States Was Acting
for Itself in 1819 and Not for
the State of Louisiana*

Ignoring for the moment the constitutional requirement of specific Congressional approval before a state boundary can be changed, it should be pointed out that the territorial boundaries agreed to in the Treaty of 1819 do not touch a single boundary of the State of Louisiana as established by Congress and the Constitution of Louisiana. The Treaty does not mention the State of Louisiana and neither do the extensive negotiations and subsequent commentaries which have been examined by Plaintiff." The same is true of the Treaty of 1828 with Mexico" and the Treaty of 1838 with the

¹³ MILLER, TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES, 3-64; MARSHALL, A HISTORY OF THE WESTERN BOUNDARY OF THE LOUISIANA PURCHASE, 1818-1841 (1914) 17-244; *State Papers, Foreign Relations IV*, 422-692; COX, *The Louisiana-Texas Frontier*, SOUTHWESTERN HISTORICAL QUARTERLY (1913), Vol. XVII, 1-42, 140-187.

¹⁴ MILLER, *supra*, 405-420; MARSHALL, *supra*, 71-123.

Republic of Texas," adhering to the same boundary as in the Treaty of 1819. The relevant portions of all these treaties are printed in *Tex. Br. App.*, 7-20.

As stated in the opening sentence of the Treaty of 1819, it was concerned with defining as between the United States and Spain "the limits of their respective bordering *territories* in North America." For the United States, this meant the boundaries of the residue of the territory purchased from France, which the United States claimed to include all of Texas, all or portions of what later became the States of Arkansas, Missouri, Iowa, Minnesota, Oklahoma, Kansas, Nebraska, South Dakota, North Dakota, Montana, Wyoming, Colorado, New Mexico, Idaho, Oregon, and Washington, and part of West Florida.

The sixteen years of negotiations with Spain on this Treaty began in 1803," nine years before the State of Louisiana was created, and continued for seven years after Louisiana was admitted as a State. During all of these sixteen years the United States insisted that it was entitled to all of the Province of Texas, receding at times during the latter years from the Rio Grande to the Colorado River, the Trinity River, and finally to the west bank of the Sabine." By the final terms agreed upon in 1819, the United States relinquished all of Texas west of the west bank of the Sabine in exchange for Florida and the Spanish claim to the Oregon Territory." There was strong public and official reaction led by Henry Clay, against the relinquishment of Texas, and final ratifications were not exchanged until February 19, 1821."

¹²³ MILLER, *supra*, 133-143; MARSHALL, *supra*, 206-241.

¹²⁴ MARSHALL, *supra*, 70.

¹²⁵ *Id.*, 17-70.

¹²⁶ *Id.*, 46-70.

¹²⁷ *Id.*, 66-74. Thomas Jefferson wrote to Henry Dearborn on July 5, 1819: "I cannot say I am anxious about the Spanish

If this Treaty had put an end to the plans of national leaders who wanted Texas as a territory and possibly as a future State, there might have been some reason for Congress to have permitted Louisiana to extend its boundary so as to include the western half of the Sabine. However, this was not the case. Henry Clay and John Quincy Adams immediately renewed efforts to regain Texas by diplomacy or purchase."

In 1821, Mexico declared its independence from Spain, and during the next fourteen years of negotiations with the new Mexican Republic as to the same boundary, the main thrust of the negotiators appointed by both President Adams and President Jackson was to effect a purchase of Texas from Mexico and fix the western boundary at the Rio Grande or as far west as possible. Mexico declined in 1828 and, as the price for a Treaty of Commerce, forced the signing of the Treaty of 1828. In it the United States agreed to the boundaries contained in the Treaty with Spain in 1819, but ratifications were delayed until April 5, 1832. (See footnote 17).

Appointment of commissioners to run the boundary was delayed, and it was never surveyed as agreed to in the Treaty. During this delay, President Jackson kept Anthony Butler in Mexico for six years still attempting to negotiate a purchase of Texas, with the offer finally reaching \$5 million." Also, Jackson interposed a claim that the Neches River (which lies west of the

treaty; in giving up the province of Texas, we gave up a sugar country sufficient for the supply of the United States. I would rather keep that and trust to the inevitable falling of Florida into our mouths." XIX THE WRITINGS OF THOMAS JEFFERSON, 270, 271. (Monticello ed. 1904)

"MARSHALL, *supra*, 86-123; MANNING, TEXAS AND THE BOUNDARY ISSUE, 1822-1829 (1913), XVII SOUTHWESTERN HISTORICAL QUARTERLY, 217, 240-260.

"MARSHALL, *supra*, 86-99.

Sabine but also runs into Sabine Lake) was the stream called the "Sabine" in the Treaty of 1819 and vowed that in any survey he would contend for that river as the boundary and would defend it by force if necessary."

Although not conclusive, there is evidence that Jackson and his friend, General Sam Houston, who came to Texas in 1832, had agreed upon a plan to wrest Texas from Mexico by revolution." In any event, that is what occurred in 1836. At the first election in the new Republic, Sam Houston was named President and the people voted overwhelmingly to seek annexation to the United States." The Republic was recognized as an independent nation on March 1, 1837," and the Sabine portion of the boundary agreed upon with Spain in 1819 and with Mexico in 1828 was first run on ground in accordance with the Treaty of 1838 between the United States and the Republic of Texas. (8 Stat. 511; Tex. Br. App., p 18). Annexation followed in 1845, or reannexation as many members of Congress called it." Texas was admitted as a State on December 29, 1845. 9 Stat. 108. Within less than three years thereafter,

"STENBERG, *Jackson's Neches Claim, 1829-1836*, XXXIX SOUTHWESTERN HISTORICAL QUARTERLY 255.

"*Id.*, also STENBERG, *The Texas Schemes of Jackson and Houston, 1829-1836*, SOUTHWESTERN SOCIAL SCIENCE QUARTERLY, XIII, 264-286; XV, 299-350. As early as 1833, Jackson endorsed a letter from Anthony Butler with these words: "The Convention in Texas meets the 1st of next April to form a constitution for themselves. When this is done, Mexico can never annex her jurisdiction again, or control its legislature. It will be useless after this act to enter into a treaty of boundary with Mexico." MARSHALL, *supra*, 102.

"JOHN HENRY BROWN, *HISTORY OF TEXAS, 1689-1892*, II 99.

"CONG. GLOBE, 24th Cong., 2d Sess., 270.

"President Polk also used the term "reannexation," and called the action by the United States "the peaceful acquisition of a territory once her own." *Inaugural Address, 1845*, V MESSAGES AND PAPERS OF THE PRESIDENTS, 2223, 2230-31.

Congress consented to the new State extending its eastern boundary from the west bank of the Sabine to the Louisiana line in the middle of the stream. (9 Stat. 245; Tex. Br. App., p. 23).

The foregoing summary of historical facts, which are subject to judicial notice, shows that in the Treaties of 1819, 1828, and 1838, the United States was acting for itself and not for the State of Louisiana, or any other single state, in delimiting the boundaries of the Nation's "*territories*" which bordered the original Province of Texas. They also show that the negotiations and treaties relating to the area west of the middle of the Sabine were chiefly concerned with keeping Texas as a territory or paving the way for it to become a State.

Until 1845, the western half of Sabine Pass, Sabine Lake and Sabine River was all that the Nation salvaged from that part of the territory ceded by France south of the 33rd degree of north latitude and west of the middle of the Sabine. However, the narrow width of this area did not make it any less a territorial possession subject to the Constitution and laws relating to territories of the United States." This was so held in a decision of the General Land Office, opinion by the First Assistant Secretary of the Interior, June 27, 1910, in a hearing involving title to certain islands in the Sabine in which both Louisiana and Texas were parties. The opinion said:

"Oklahoma v. Texas, 258 U.S. 574. Actually, Sabine Lake has an average width of 34,000 feet, and the greater area in controversy is in the western half of Sabine Lake, which comprises 30,727 acres, as compared with 4,000 acres in the western half of the River, and 1010 acres in the western half of the Pass. See affidavit of R. C. Wisdom, Director of the Surveying Division, General Land Office of Texas, Texas Exhibit G, Item 1.

"The boundaries thus defined necessarily left the western portion of the westernmost channel (of the Sabine) exclusively in Federal jurisdiction and dominion."

The brief filed by Louisiana in that hearing on September 16, 1909, pages 9-10, conceded this point in the following language:

"The United States enjoyed undisputed and general jurisdiction over the remaining western half, from the middle of the main or sailing channel, of said Sabine Pass, Sabine Lake and Sabine River, to the western shore from the date of the treaty with Spain, February 22, 1819, to July 5, 1848, at which latter date the following Act to extend the Texas boundary (U.S. Stat. Vol. 9, 245) was passed:" (The brief then cites the Act consenting to Texas extending its eastern boundary so as to include the western half of the Sabine Pass, Lake and River.) National Archives, Record Group 49.

Louisiana now seeks to dispute the position taken by its attorneys in 1909, as quoted above. It leans on three weak reeds: (1) an isolated report to Congress from Adams and Clay; (2) a Texas Court of Civil Appeals opinion relating to the Rio Grande; and (3) a theory of automatic boundary change or "coalescence" because of contiguity. We shall reply in that order under appropriate subheads.

The Adams-Clay Report

As heretofore shown, all treaties with Spain, Mexico and the Republic of Texas were made by the United States on its own behalf fixing the west bank of the Sabine as the west boundary of the United States, and not as the west boundary of the State of Louisiana.

"39 DECISIONS RELATING TO PUBLIC LANDS 53, 57 (1910), General Land Office, Department of Interior. Opinion and Louisiana Brief copied in full as Items 1 and 2 of Tex. Ex. B.

This is further evidenced by the cover sheet of President Adams' message to Congress on January 15, 1828 (Louisiana's Exceptions Brief, p. 117), transmitting a report from Secretary of State Henry Clay. Because President Adams makes passing reference to "the boundary between the State of Louisiana and the Province of Texas," Louisiana assumes that this and Clay's report referred to the west bank of the Sabine. This ignores the fact that both Adams and Clay were at the time busily engaged in negotiations with Mexico for a boundary line much farther west than the Sabine." The treaty with Mexico fixing the same line as the 1819 Treaty with Spain, although bearing a signatory date of January 12, 1828, was not known by Clay to have been concluded, according to his report of January 14, 1828, and it was not finally ratified and proclaimed until April 5, 1832. 8 Stat. 372.

The west bank of the Sabine as the western boundary of the United States was never surveyed until Texas became a Republic, and the Boundary Convention between those two Republics and the instructions to the Boundary Commissioners quite clearly relate only to an international boundary with no mention of the State of Louisiana in the instructions or the subsequent report. La. Ex. A-14, pp. 221-255. The Secretary of State's instructions to its Commissioner, J. H. Overton, dated April 8, 1840, stated:

"The duty assigned to the commission is one of a purely ministerial character to run and mark a line of boundary described with singular clearness and precision in a solemn treaty between two nations."

Louisiana also introduced an opinion dated March

¹See fn. 17, supra.

²See Ex. B attached to Louisiana's Memo No. 1 filed with Special Master as La. Ex. S.

7, 1910, from S. V. Proudfit, Acting Commissioner of the General Land Office to the Secretary of the Interior, in which it was stated:

"The Joint commission named under a convention between the United States and the Republic of Texas designated 'The Narrows' or western channel as the boundary line between the United States and Texas, but in doing so did not necessarily fix the western boundary of Louisiana. *The commission was not concerned with Louisiana's boundary; it was only required to locate and designate the boundary between the two republics and not the line between Louisiana and Texas.* There is no question but what the line established by this commission was not the western boundary of Louisiana and that there was Federal territory lying between the eastern boundary of Texas and the western boundary of Louisiana which did not form a part of either of these states, because Congress by the Act of 1848, extended the eastern boundary of the State of Texas from The Narrows to the center of the Sabine River which formed the boundary of the State of Louisiana, thus making the lines of the two States coincident for the first time."

These official records introduced by Louisiana preclude the necessity for further argument on this point. Clearly, Louisiana's western boundary was still "a line to be drawn along the middle of the said river," completely unaffected by the Nation's boundary being fixed on the west bank of the river.

Fragoso v. Cisneros, Relating to the Rio Grande

Louisiana cites the case of *Fragoso v. Cisneros*, 154 S.W.2d 991 (Tex. Civ. App. 1941, writ ref. w.o.m.) involving the Rio Grande boundary between the United States and Mexico as authority for its theory of an automatic change in a State's boundary as the result of the Nation changing its boundary by a treaty with

Mexico. This lower court cites no authority for its "common sense, practical construction", and the decision does not conform with Article IV, Section 3 of the United States Constitution; the decisions of this Court with respect to lands acquired by treaty; or the interpretation and action of Congress with respect to the necessity for it to grant Texas authority for these very lands along the Rio Grande to be brought within the boundaries of Texas.

With respect to these banco lands, which became a territory of the United States by reason of the Treaty with Mexico in 1905 and subsequent treaties, Congress enacted Public Law 132 in 1922 (42 Stat. 359) authorizing Texas to bring the new area within its jurisdiction, and Texas enacted a law so extending its boundaries. (GENERAL LAWS OF TEXAS, Ch. 101, 1923). Both laws and the House Judiciary Committee Report covering the necessity of this procedure are reproduced in Texas' Exhibit G, pp. 59-65.

The western half of the Sabine, being a territorial possession of the United States, its disposition or incorporation within the boundaries of an existing State was governed by Article IV, Section 3 of the United States Constitution and required action by the Congress. The relevant portion of the Constitution reads:

"... no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States;..."

There are numerous Supreme Court decisions on this point. In *Van Brocklin v. Tennessee*, 117 U.S. 151, 168 (1886), the Court said:

"But public and unoccupied lands, to which the United States have acquired title . . . by treaty with a foreign country, Congress, under the power conferred upon it by the Constitution, 'to dispose of and make all needful rules and regulations respecting the territory or other property of the United States' has the exclusive right to control and dispose of, as it has with regard to other property of the United States; and no state can interfere with this right or embarrass its exercise."

Since the Congress of the United States did not authorize Louisiana to extend its western boundary to the west bank of the Sabine, the western half of the Sabine remained a part of the territory of the United States from 1819 until Congress authorized Texas to extend its boundary so as to include the area on July 5, 1848 (9 Stat. 245; Tex. Br. App., 23-24) and Texas complied on November 24, 1849 (3 GAMMELS LAWS OF TEXAS 442; Tex. Br. App., 24).

Louisiana Boundary Did Not Automatically Change or Coalesce

We have already answered much of Louisiana's argument for an automatic change of boundary without approval of Congress and without action of its Legislature. Louisiana's final argument—that being the westernmost State after the Treaty of 1819 was ratified in 1821, it should have automatically inherited the western half of the Sabine—ignores the fact that

"For other cases holding that new territory acquired by treaty does not even become a part of the United States and subject to its domestic law without an Act of Congress, see Tex. Br., 30-33.

there remained strong opposition to the treaty relinquishing Texas up to the date of its ratification," and thereafter every American President and Secretary of State continuously sought to reacquire Texas by purchase or diplomacy until the Texas Annexation Agreement was accomplished in 1845." There was a reason for Congress to retain the western half of the Sabine for a possible future state, and any other policy would have been an unfair precedent for each subsequent western state which was later added to the Union. For instance, in 1846 Texas was the most western state and bordered on the Rio Grande with a Spanish Territory which later became the Territory and State of New Mexico. Its western border was very properly and consistently fixed at the middle of the Rio Grande. *New Mexico v. Texas*, 275 U.S. 279 (1927).

Louisiana's theory of automatic enlargement of its boundary after 1819 because of being then the most western state of the Union is akin to the old rule of "contiguity" or "geographical propinquity" by which nations once acquired additional territory under international law. The doctrine was rejected in the 19th century "because it is wholly lacking in precision," and it was never applied to include areas outside of a fixed statutory boundary or "to the extent of invoking it to supersede a vested legal title" in another sovereign." Obviously, the theory cannot apply on behalf of Louisiana against the United States under a Constitution

"Much of the opposition came from Louisiana. Secretary of State Adams wrote that ratification in 1821 was opposed in a resolution introduced in the Louisiana Legislature and that Louisiana Governor T. B. Robertson "made an attack upon the treaty in his speech to the Legislature." V-MEMOIRS OF JOHN QUINCY ADAMS, 285-86.

"IV SAMUEL FLAGG BEMIS, *THE AMERICAN SECRETARIES OF STATE AND THEIR DIPLOMACY* (1928); *United States v. Louisiana, et al.*, 363 U.S. 1, 39-40, footnote 73.

"II U.S. DEPARTMENT OF STATE, *DIGEST OF INTERNATIONAL LAW* 1046-1059 (1963).

which requires the approval of Congress before a State can change its boundary. In all of the cases cited by Defendant on this point, Congressional approval was held to be required.

The Supreme Court held squarely against Louisiana in *United States v. Louisiana, et al.*, 363 U.S. 1 (1960), when that State advanced the same argument with respect to its southern boundary being automatically extended to include any adjacent "tidelands" belt which was acquired by the United States under international law after Louisiana's admission to the Union. The Court said:

"It is sufficient for present purposes to note that there is no question of Congress' power to fix state land and water boundaries as a domestic matter. Such a boundary, fully effective as between Nation and State, undoubtedly circumscribes the extent of navigable *inland* waters and underlying lands owned by the State under the Pollard rule." (35)

* * *

"To the extent that Louisiana's reliance on postadmission events is for the purpose of showing that the United States established a three league 'National Boundary' in the Gulf, they cannot help her case, for reasons previously discussed. . . . Under the Submerged Lands Act, Louisiana's boundary must be measured at the time of her admission unless a subsequent change was approved by Congress. If the Act of Admission fixed the boundary at the shore, neither action by Congress fixing greater boundaries for other States nor Executive policy on the extent of territorial waters could constitute Congressional approval of a maritime boundary for Louisiana. . . ." (75-76)

Louisiana's argument for enlargement of a fixed water boundary by "coalescence" is analogous to a recognized legal doctrine of "accretion". However in a case where the ordinary rule of accretion would oth-

erwise apply, the Supreme Court held in *New Mexico v. Texas*, 275 U.S. 279, 301-302 (1927), that the rule did not operate to move the river boundary that had been otherwise fixed in the middle of the Rio Grande by the Act of Congress admitting New Mexico as a State and by the Constitution of New Mexico adopted prior to its admission. This case is squarely in point, because it involved a river boundary between two States, and Texas was complaining of the Master's finding that the boundary had been moved eastward by accretion which occurred after the boundary had been fixed in the middle of the Rio Grande as it existed in 1850. In overruling this portion of the Master's Report, the Supreme Court said:

"Both sides have filed exceptions to the master's report in reference to accretions. Texas, on the one hand, insists that he was in error in reporting as the boundary line the location occupied by the river after it has been moved eastward from its location in 1850 by accretions. New Mexico, on the other hand, insists conditionally—that is, only if its exceptions as to the location in 1850 are not sustained—that in determining the accretions in the Country Club area the master fixed the line of such accretions in an indefinite manner and not far enough to the east. We find that the contention of Texas is well taken and the conditional contention of New Mexico is therefore immaterial.

"This case is not one calling for the application of the general rule established in *Nebraska v. Iowa*, 143 U.S. 359, *Missouri v. Nebraska*, 196 U.S. 23, *Arkansas v. Tennessee*, 246 U.S. 158, and *Oklahoma v. Texas*, 260 U.S. 606, as to changes in State boundary lines caused by gradual accretions on a river boundary.

* * *

"New Mexico, when admitted as a State in 1912, explicitly declared in its Constitution that its

boundary ran 'along said thirty-second parallel to the Rio Grande . . . as it existed on the ninth day of September, one thousand eight hundred and fifty, to the parallel of thirty-one degrees, forty-seven minutes north latitude.' This was confirmed by the United States by admitting New Mexico as a State with the line thus described as its boundary; and Texas has also affirmed the same by its pleadings in this cause. *Since the Constitution defined its boundary by the channel of the river as existing in 1850, and Congress admitted it as a State with that boundary, New Mexico, manifestly, cannot now question this limitation of its boundary or assert a claim to any land east of the line thus limited.*" (301-302)

Texas submits that the foregoing case completely answers all of Louisiana's contentions that this Sabine boundary could have been changed to include the western half of the river by any method other than legislative action by Congress and by the State of Louisiana. The Defendant shows neither.

C. The eastern boundary of the State of Texas was properly and legally extended to include the western half of the Sabine River by the Act of Congress of July 5, 1848, and the Act of the Texas Legislature on November 24, 1849,

(1) The Consent of Congress.

The consent of Congress in the Act of July 5, 1848 (9 Stat. 245) reads as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Congress consents that the legislature of the State of Texas may extend her eastern boundary so as to include within her limits one half of Sabine Pass, one half of Sabine Lake, also one half of Sabine River, from its mouth as far north as the thirty-second degree of north latitude."

This action had been requested by Resolution of the Texas Legislature approved March 18, 1848. See Tex. Br. App., 22.

(2) The Act of the Texas Legislature

The Act of the Texas Legislature extending its eastern boundary to the middle of the Sabine reads in part as follows:

"Sec. 1. *Be it enacted by the Legislature of the State of Texas*, That in accordance with the consent of the Congress of the United States, given by an act of said Congress, approved July 5th, 1848, the Eastern Boundary of the State of Texas be, and the same is hereby extended so as to include within the limits of the State of Texas, the western half of Sabine Pass, Sabine Lake and Sabine River from its mouth as far north as the thirty-second degree of north latitude . . ." (See full text in Tex. Br. App., 24.)

(3) State Ownership and Jurisdiction Extend to the Waters of and Lands Beneath Navigable Streams within State Boundaries.

It is conceded by Louisiana that the Sabine River is navigable in fact throughout the length involved in this controversy and that it has been navigable in fact since 1812. (See Answer, p. 4 and Stipulation). Therefore, under a long-established rule of law, Texas has had State jurisdiction over and ownership of the lands beneath the waters of the western half of the Sabine ever since the area was legally embraced within its boundaries. Navigability and location within State boundaries are the two basic requirements of the rule. It was stated as follows in *Martin v. Waddell*, 16 Pet. 367, 410 (1842):

"For when the Revolution took place, the people of each state became themselves sovereign; and in

that character hold the absolute right to *all their navigable waters and the soils under them*, for their own common use, subject only to the rights since surrendered by the Constitution to the general government."

The most often cited case is *Pollard's Lessee v. Hagan*, 3 How. 212, 229 (1845), which said:

"First. The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the States respectively. Second. The new States have the same rights, sovereignty, and jurisdiction over this subject as the original States."

In any event, the rule has been confirmed and reinforced by the Submerged Lands Act of 1953, which quitclaimed to the states "title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters." 67 Stat. 29.

Louisiana's contention that the Congressional Act of July 5, 1848 (9 Stat. 245) only referred to criminal jurisdiction is fully answered in the Special Master's Report, p. 25. There was no limitation in the Act authorizing Texas to extend its boundary so as to include the western half of the Sabine. Since the area was part of the territory of the United States outside of the boundaries of the State of Louisiana, there is no legal basis for Louisiana to question the constitutionality of this disposition of the area by Congress. Article IV, Section 3, U.S. CONSTITUTION; *Alabama v. Texas*, 347 U.S. 272 (1953); *Van Brocklin v. Tennessee*, 117 U.S. 151, 168, (1886).

II

THE SPECIAL MASTER CORRECTLY
HELD THAT IN ADDITION TO ITS TITLE
ACQUIRED FROM THE UNITED STATES

AS A MATTER OF LAW, TEXAS HAS ESTABLISHED ITS EASTERN BOUNDARY IN THE GEOGRAPHIC MIDDLE OF THE SABINE UNDER THE DOCTRINE OF PRESCRIPTION AND ACQUIESCENCE. (In Reply to Louisiana's Exception No. 2 and Point "B" of Louisiana's Brief).

The Special Master's Report on prescription and acquiescence (pp. 27-30), and his careful listing and comments on the volumes of evidence showing acts of prescription by Texas and acts of acquiescence by Louisiana to the geographic mid-stream boundary (Appendix A-E, pp. 41-109), clearly demonstrate the correctness of his finding on this point. Further briefing would be simply repetitious. The Master's Report is fully supported by the evidence covering more than a century of recognition and use of the geographic mid-stream boundary by both Texas and Louisiana and by the United States.

Louisiana sums up its reply on this point with the argument that "the undisputed facts do not sustain the findings of the Special Master that Louisiana *lost title* to the bed and subsoil of the west half of the Sabine." In the first place, the Master did not find that Louisiana "*lost title*". He found that as a matter of law Louisiana *never had title* to the west half of the Sabine, and that prescription and acquiescence merely confirmed the legal title of Texas to the geographic mid-stream boundary which had been fixed as a matter of law. In the second place, the Special Master was not obliged to make this finding on undisputed evidence. That would have been necessary only if he had made the finding on Texas' Motion for Summary Judgment, which the Master did not do. Instead, he conducted a full hearing on the merits, receiving all evidence offered by both States. (Report, p. 6-7). Therefore, the

Special Master was entitled to make his findings on the preponderance of the evidence and not alone on undisputed evidence.

If the Court will briefly examine the 193 acts, maps, shell leases, oil leases, pipeline rights-of-way, tax collection affidavits, exercises of law enforcement jurisdiction, bridge agreements and other items specifically enumerated by the Special Master (Report, 41-109) as showing recognition and use of the geographic mid-stream of the Sabine as the boundary between Texas and Louisiana, it will be evident that any other finding on prescription and acquiescence would have been against the great weight and preponderance of the evidence. Such an examination of the exhibits will not be as tedious as it may sound, because they have been carefully grouped and indexed. For instance, large maps prepared by Federal, Louisiana and Texas agencies are assembled in Texas Exhibits A and F, and other maps, pictures and documents may be readily referred to through the index pages in the front of Texas Exhibits B, C, D, E, G, H and K.

From November 24, 1849, when Texas extended its boundary and the boundaries of all of its counties to include the western half of the Sabine, under consent granted by Congress, the record shows that Louisiana acquiesced in the geographic mid-stream boundary (as previously fixed by Congress and the Louisiana Constitution in 1811 and 1812) for more than 92 years without a single protest or claim to a different boundary. It was not until 1941 that a Louisiana Governor asserted a claim to the west bank, and he recognized that the claim would not stand if "there has been acquiescence." (Tex. Ex. C, 49; Ex. G, 67, 72). The record shows that this was but a temporary and passing fancy, never pursued with any type of possession or suit

which would interrupt Texas' prescription. *Michigan v. Wisconsin*, 270 U.S. 295, 313-319 (1926); *Indiana v. Kentucky*, 136 U.S. 479, 509-10 (1890). Neither did it interrupt Louisiana's acquiescence, because the State continued thereafter to make maps, oil and gas leases, bridge agreements, and right-of-way easements depicting the geographic middle of the Sabine as the boundary between the two States.

Even after the filing of this suit, Louisiana was still distributing copies of the maps made by that State in co-operation with the U.S. Geological Survey in 1957 (Affidavit of James H. Quick, Tex. Ex. B, 40; Ex. A, 27) and its 1970 State Highway Map (Tex. Ex. A, 49), which clearly depict the geographic middle of Sabine Lake as the boundary between the two States. Pictured at page 100 of Texas Exhibit E are both sides of the existing "State Line" sign erected in the center of the bridge across the Sabine on U.S. Hwy. 10, and at page 101 is the contract between the two States for the erection and maintenance thereof dated October 3, 1962. Louisiana has never levied or collected any taxes on railroad bridges, pipelines, utility lines, or oil and gas leases beyond the geographic middle of the Sabine, while Texas and its political subdivisions have collected taxes on such property on the west side of the geographic center of the Sabine continuously since 1905. (Tex. Ex. C, 27-64; Ex. G, 115-161). Clearly, this is a case where for more than 120 years before filing this suit the Louisiana Legislature and Louisiana officials have recognized, mapped and used the geographic center of the Sabine as the western boundary of the State contrary to the position now being taken by its attorneys in this case.

One specific act of recognition by the Louisiana Legislature contrary to its attorneys' present contentions should be noted. It is Resolution 212 passed by the Lou-

isiana Legislature on March 16, 1848, seeking consent of Congress to extend its boundary to the west bank of the Sabine (Full Text in Special Master's Report 16-17). Quoting only a portion of this Resolution 212, Louisiana's present counsel would lead the Court to believe that it was a claim or declaration of a then existing State boundary "on the west side of the Sabine River" (La. Exceptions Br., 33-36; 48), and that the purpose of the Resolution was merely to seek criminal jurisdiction over lands already within its boundaries. A full reading of the entire Resolution 212, rather than excerpts taken out of context, will demonstrate the inaccuracy of this interpretation. In fact, it means just the contrary and is one of the most conclusive documents in this case against the factual and legal contentions now being made by Louisiana against the Special Master's findings. The "Whereas" clause clearly recognizes that on March 16, 1848 "the Constitution and the Laws of the State of Louisiana" *did not* extend over "the waters of the Sabine River, from the middle of the stream to the western bank thereof," and it proposes that the "constitution and jurisdiction of the State of Louisiana shall be extended *over part of the United States*", embraced within such limits, "when- ever the consent of the Congress of the United States can be procured thereto . . ." This was a far cry from asserting a then existing boundary covering the western half of the Sabine. In fact, it was a complete recognition (1) that the area in controversy then was under the exclusive jurisdiction of the United States and not within the boundary of Louisiana and (2) that Congressional approval was essential before Louisiana could change its boundary to the west bank. Congress did not give its approval, but instead granted a similar petition of Texas, dated March 18, 1848 (Report, 17) authorizing Texas to extend its eastern boundary so as

to include the western half of the Sabine (Report, 18-19).

Louisiana asks the Court to take judicial knowledge of World War II, followed by the extended tidelands controversy during which it claims a "tacit" understanding that this boundary controversy would not be pushed, as a reason for excusing its acquiescence and failure to file a lawsuit since 1941. While each party perhaps had its own good reason to delay filing a suit against its neighboring State, we disclaim any agreement, tacit or otherwise, which would have prevented either State from filing a suit to resolve this question at an earlier date. The 92 years of prescription and acquiescence which had already run prior to 1941 simply continued until the date of this suit because Texas was in possession and had exercised jurisdiction over the west half of the Sabine continuously since 1849, and Louisiana was never in possession and never exercised any jurisdiction over the west half at any time during a total of more than 120 years. Its claim to the west bank, now asserted for the first time in a Court of law, is without merit and completely contrary to its previous acts of acquiescence and recognition of the geographic mid-stream boundary which was fixed by Acts of Congress for Louisiana in 1811 and for Texas in 1848. The Special Master correctly held, upon the great weight and preponderance of the evidence, that this line as fixed by Congress has been confirmed by prescription and acquiescence.

III

THE SPECIAL MASTER CORRECTLY HELD THAT THE BOUNDARY IS THE GEOGRAPHIC MIDDLE OF THE STREAM RATHER THAN THE THALWEG CENTER OF A MAIN NAVIGABLE CHANNEL. (In

reply to Louisiana's Exception No. 3 and Point "C" of Louisiana Brief).

There are four reasons why the thalweg rule does not apply to this water boundary, and the Special Master has discussed the law and the evidence with respect to three of them. (Report, 31-34). The history of, reasons for, and explicit exceptions to the thalweg rule clearly demonstrate its inapplicability to the Sabine boundary line between Texas and Louisiana, for the following reasons:

- A. The only basis for the Thalweg Rule is absent in this case, because free and common use of the entire river for navigation was reserved to the adjacent territories and future states by statutes and treaty.**

On navigable rivers, the original and more ancient rule calls for equal division of territory by use of a line equidistant from the river banks, and this is still the rule applicable to non-navigable rivers and to those navigable rivers in which a main channel is unknown or is not involved or alleged." The only reason for a change in the ancient rule was to assure the states bordering on a river equal use of the main channel of navigation. The Supreme Court stated in *Minnesota v. Wisconsin*, 252 U.S. 273, 282 (1920):

"The doctrine of Thalweg, a modification of the more ancient principle which required equal division of territory, was adopted in order to preserve to each State equality of right in the beneficial use of the stream as a means of communication. Accordingly, the middle of the principal channel of navigation is commonly accepted as the boundary."

¹¹II SHALOWITZ, COAST AND GEODETIC SURVEY, U. S. DEPARTMENT OF COMMERCE, *Shore and Sea Boundaries*, 374 (1962); *Georgia v. South Carolina*, 257 U.S. 516, 521 (1922); *Iowa v. Illinois*, 147 U.S. 1, 7-8 (1892).

In *Iowa v. Illinois*, 147 U.S. 1, 7-8 (1892), the Supreme Court held the thalweg doctrine for boundaries between States is based entirely upon this equitable principle: "The interest of each State in the navigation of the river admits of no other line. The preservation by each of its equal right in the navigation of the stream is the subject of paramount interest." However, the opinion includes the following quotation from CREASY, FIRST PLATFORM ON INTERNATIONAL LAW, 222, which indicates that the ancient geographic line is the *prima facie* line until the existence of a different main channel is alleged and proven:

"Formerly a line drawn along the middle of the water, the *medium filum aquae*, was regarded as the boundary line; and still will be regarded *prima facie* as the boundary line, except as to those parts of the river as to which it can be proved that the vessels which navigate those parts keep their course habitually along some channel different from the *medium filum*. When this is the case, the middle of the channel of traffic is now considered to be the line of demarcation."

In the same case, the Court made it clear that the thalweg rule will not apply if it has been otherwise provided "by statute or usage of so great a length of time as to have acquired the force of law." This exception is also stated by the Court in *Arkansas v. Tennessee*, 246 U.S. 158, 170 (1918).

In *Georgia v. South Carolina*, 257 U.S. 516 (1922), the Supreme Court, then composed of eight of the same members who decided *Arkansas v. Tennessee*, supra, held that since equal rights of both States to navigation had been otherwise preserved, the reason for applying the thalweg doctrine was "out of the case." Therefore, the Court applied the more ancient general rule, deciding that the boundary line in the river was "midway between the banks of the stream."

In 1811, while the Territory of Orleans covered all lands from the Mississippi on the east to the Rio Grande on the west, Congress enacted a statute relating to the public lands in the Territories of Orleans and Louisiana, Section 12 of which provided:

"Section 12. *And be it further enacted*, That all Navigable rivers and waters in the Territories of Orleans and Louisiana, shall be, and forever remain, public highways."

In 1812, while the United States was still asserting its title to all lands between the Mississippi and the Rio Grande, Congress provided in the Act of Admission of the State of Louisiana" the following:

"Provided, That it shall be taken as a condition upon which the said state is incorporated in the Union, that the river Mississippi, and the navigable rivers and waters leading into the same, and into the gulf of Mexico, shall be common highways, and for ever free, as well to the inhabitants of the said state as to the inhabitants of other states and territories of the United States, . . ."

Article 3 of the Treaty of 1819 between the United States and Spain contained the following provision:

"... the use of the Waters and the navigation of the Sabine to the Sea, and of the said Rivers, Roxo and Arkansas, throughout the extent of the said Boundary, on their respective Banks, shall be common to the respective inhabitants of both Nations."

"Act approved February 15, 1811, Appendix, Public Acts of Congress, 1811, 1296, 1302. A copy is in Plaintiff's Exhibit G, 47-50.

"2 Stat. 701, April 8, 1812; Tex. Br. App. 5-7.

"8 Stat. 252, Treaty of 1819, proclaimed February 22, 1821. Tex. Br. App., 9. This provision was carried forward in the Treaty with Mexico of 1828, 8 Stat. 372 (Tex. Br. App. 14).

Louisiana admits that under the above statutes and treaty the entire Sabine is free to uninterrupted navigation by the citizens of both States. It makes no allegation or argument that a boundary in the middle of a thalweg or a main channel of navigation is necessary to protect its rights of navigation. It is obvious that navigation is not an interest, much less the "paramount" or "controlling" interest so essential for the application of the thalweg doctrine.

Therefore, Texas submits that the Special Master has correctly held that the Supreme Court's decision in *Georgia v. South Carolina*, supra, is controlling and that the boundary should be determined to be in the geographic middle of the Sabine bodies of water, equidistant from the banks and shores, which is the location that has been recognized and followed by Congress, Federal agencies, and agencies of both States for more than 120 years.

This was also the holding of the Supreme Court of Louisiana in the second case of *State v. Burton*, 31 So. 291 (1902), a copy of which is in Plaintiff's Exhibit C, 21-22. In the first case of *State v. Burton*, 29 So. 970 (1901), the Supreme Court of Louisiana had held that the middle of the Sabine was the boundary between Texas and Louisiana. A copy of this decision is in Plaintiff's Exhibit B, 86. In the second case, referring to the meaning of the "middle" of the Sabine, the syllabus written by the Court said:

" 'The thread' of a stream is the line midway between the banks at the ordinary stage of water, without regard to the channel or the lowest and deepest part of the stream."

Louisiana departs from its thalweg claim in advocating that the boundary line should be drawn west of all islands, regardless of the location of the main chan-

nel, citing *Georgia v. South Carolina, supra*. There is a vital point which distinguishes that case from the present case. The boundary description between Georgia and South Carolina did not call for a "middle line" through the rivers involved. Instead, it specifically called for "the most northern branch" of the Savannah and Tugalo Rivers, and specifically reserved to Georgia (the State bounded on the South) "all islands in the rivers Savannah and Tugalo." This was the reason the Supreme Court determined that the geographic middle of the most northern branches of these rivers should be followed north of the islands so as to leave them in the State of Georgia. On the other hand, in 1811 Congress called for the Louisiana boundary to be "*a line to be drawn along the middle of said river, including all islands to the thirty-second degree of latitude.*" The primary emphasis in the Act and all subsequent evidence of interpretations by the parties is on the "line to be drawn along the middle" so as to include one-half of the Sabine in Louisiana and one-half in Texas. This recognizes that where an island is encountered "by a line to be drawn along the middle of said river" the boundary runs in the western branch midway between the western bank of the river and the bank of the island.

The U. S. Geological Survey, acting in cooperation with the State of Louisiana, followed this rule in positioning the boundary in the branch of the Sabine west of Shell or Sabine Island where the Sabine River flows into Sabine Lake and in the center of the Narrows (west branch) in Orange County. These two instances are shown on the U.S.G.S. Quadrangles at pages 25 and 41, respectively, of Plaintiff's Exhibit A. We have no quarrel with Louisiana in the application of this rule so long as it does not seek to divert the line entirely away from the geographic middle line so as to encom-

pass islands which are not intercepted by the geographic middle line.

B. The United States, as common source proprietor, provided by statute for a geographic middle line in the Sabine.

In using the words "thence by a line to be drawn along the middle of said river" in the Enabling Act for creation of the State of Louisiana, approved February 20, 1811, there was no reason for Congress to intend anything other than a line along the geographic middle of the Sabine, because five days earlier it had already provided free access for navigation of the entire river in its Territorial Lands Act of February 15, 1811, *supra*.

The only possible basis for interpreting the language to mean the middle of a thalweg or main channel of navigation was absent, and this was confirmed in the Act of Admission, approved April 8, 1812, which contained both the boundary language above quoted and a reiteration that these "navigable rivers and waters . . . shall be common highways, and for ever free, as well to the inhabitants of the said state as to the inhabitants of other states and the territories of the United States . . ."

This was the construction given to the Sabine River boundary language of the aforesaid statutes when Congress passed the Act of July 5, 1848 (9 Stat. 245) consenting for Texas to "extend her eastern boundary so as to include within her limits *one half* of Sabine Pass, *one half* of Sabine Lake, *also one half* of Sabine River . . ." (Emphasis supplied). Obviously, these are mathematical terms indicating geographic halves of the river and have no relation to a thalweg or main channel of navigation. Such was the precise construction given to the Acts by the Senate Judiciary Committee Chairman, who reported:

"... The boundary of the State of Louisiana extended to the middle of the Sabine; so that the half of the river and lake, to the western shore belonged to the United States, and was not included in the State of Louisiana. . . . The bill before the Senate gives the half of the river beyond the boundary of the State of Louisiana to the State of Texas . . ."

Although enacted at different sessions of Congress, these Acts refer to the same boundary and should be considered in *pari materia* so long as the construction harmonizes and does not produce a conflict. *Red Lion Broadcasting Co. vs. F.C.C.*, 395 U.S. 367, 381; SUTHERLAND, STATUTORY CONSTRUCTION, Ch. 52, pp. 535-539; 50 AM.JR. §§ 349-350, pp. 345-349; 25 R.C.L. §§ 288, p. 1064.

C. The Geographic Middle Has Been Established by Prescription and Acquiescence.

The Special Master has correctly held that the geographic middle of the Sabine has been established under the doctrine of prescription and acquiescence (Report, 32-33). It is to this line that all of the evidence of prescription by Texas and acquiescence by Louisiana discussed in II, *supra*, applies.

The thalweg doctrine does not apply when it is established that there has been acquiescence in a long-continued assertion of dominion and jurisdiction over a given area and to a line other than the thalweg. *Arkansas v. Tennessee*, 310 U.S. 563, 571 (1940); *Arkansas v. Tennessee*, 246 U.S. 158, 170 (1918); *Iowa v. Illinois*, 147 U.S. 1, 10 (1893).

¹⁰CONGRESSIONAL GLOBE, 1st. Sess., 30th Cong., New Series No. 56 at p. 882; Tex. Br. App., 23-24.

D. There was No Well-Defined or Habitually Used Main Channel of Navigation in Sabine Pass, Sabine Lake or Sabine River in 1812 or Thereafter until Man-Made channels Were Dredged, and Louisiana Has Failed to Allege Otherwise.

The fact that the evidence shows that there was no main channel of navigation in the Sabine in 1812 or thereafter until man-made channels were dredged is a reason for denying Louisiana's thalweg claim which the Special Master did not mention.

We take it from the quotations in *Iowa v. Illinois*, supra, that the burden is upon a state asserting the applicability of the thalweg doctrine to allege and show that there in fact exists a thalweg in which "vessels which navigate those parts keep their course habitually along some channel different from the *medium filum*." This also seems evident in the other thalweg cases cited above and in Louisiana's Exceptions Brief.

Louisiana has not alleged that in 1812 or at any subsequent date, there was a known thalweg or habitually used main channel of navigation different from the geographic middle of Sabine Pass, Sabine Lake or Sabine River. Texas alleged in its Reply to the Counterclaims of Louisiana (p. 8) that there was no such channel, and Louisiana failed to make any specific denial thereof. In reply to Texas' Requests for Admissions, Louisiana admits that between 1812 and the dredging of man-made channels neither the State nor any of its departments ever surveyed or mapped a thalweg or deepwater sailing channel in the Sabine; that no such channel has ever been used as the boundary line between Texas and Louisiana; and that the State and its departments do not have in their possession any map purporting to show a thalweg or deepwater channel of navigation in Sabine River, Sabine Lake or Sabine Pass as of 1812 or any date thereafter prior to the

dredging of a man-made channel. (Requests and Answers 1-7, filed with Special Master on or about Dec. 11, 1970).

Although it was not our burden to do so, Texas introduced the affidavit of an 81 year old witness who had navigated Sabine Lake, Sabine Pass and the lower end of Sabine River since 1887. He swore that "there was no main channel of navigation North and South across Sabine Lake," which "was about the same depth all the way across between points approximately one mile from the west shore to one-half mile from the East shore" and that there was no defined or habitually used navigation channel in Sabine Lake or in the River from there to Orange. "Boats simply sought and followed the deepest water at any given time, and the location changed from time to time, being influenced by frequent overflows." (Tex. Ex. G, 44-45). Texas also introduced affidavits and U. S. Corps of Engineer Reports for 1875, 1879, 1880, 1895 and 1897 showing the almost uniform shallow depths of Sabine Lake and Pass, all indicating that only shallow draft vessels could pass the bar at Sabine Pass and that the uniform depths of the Lake and Pass were such as to accommodate these vessels "on practically any course that they chose to follow." (Affidavit of R. C. Wisdom, Tex. Ex. G., 1-3; U.S.C. of E. Reports, Tex. Ex. G., 24-43). See also depths shown on U.S.G.S.-Louisiana maps 23, 25 and 27 in Texas Exhibit A.

In *Minnesota v. Wisconsin*, 252 U.S. 273, 282-83, this Court applied the geographic middle rule to this type of water area in Lower St. Louis Bay, and it is the only rule applicable where no thalweg or main channel of navigation is shown to exist.

Louisiana accuses Texas of an ulterior motive in wanting the geographic middle so that it will have a

better chance to claim both sides of the Sabine jetties when it comes time to determine the boundary between the two states in the Gulf of Mexico. (Louisiana Exceptions Brief, 85, 120). The record shows no evidence whatever of a thalweg channel at the mouth of the Sabine being more favorable or less favorable than the geographic middle for a beginning point from which to measure the common state boundary southward into the Gulf of Mexico. The newspaper article reproduced in Louisiana's brief at page 120 concerning the Texas Parks and Wildlife Department's claims and operations in the Gulf were completely unknown to and without the approval of the Attorney General of Texas. It has been stipulated that none of the proceedings in this suit shall relate to the common boundary in the Gulf of Mexico and that during such proceedings both parties would refrain from any activities which would put this seaward boundary in controversy. After Louisiana Attorney General Guste advised Texas Governor Preston Smith of the aforesaid newspaper article, the Attorney General of Texas advised the Director of the Texas Parks and Wildlife Department of the stipulation with Louisiana and stopped his operations in the area. This is evidenced by a letter from the Attorney General of Texas to the Governor of Texas dated June 30, 1972. A copy together with a transmittal letter was sent to the Attorney General of Louisiana. (Both are reproduced herein as Appendix A.) Perhaps the Louisiana Attorney General received these communications after his brief was sent to the printer.

IV

ALL QUESTIONS RELATING TO JURISDICTION OVER ALLEGED ISLANDS WEST OF THE GEOGRAPHIC MIDDLE OF THE SABINE SHOULD BE REFERRED TO THE SPECIAL MASTER FOR REPORT AFTER

THE COURT HAS DECIDED THE BASIC BOUNDARY ISSUES.

The Special Master recommends that if the Court approves his Report as to the boundary line, he should be authorized to hear additional evidence as to the presently existing islands in the Sabine west of the geographic middle line for the purpose of determining whether they are true islands; whether they existed in 1812; and whether they have been acquired by Texas under the doctrine of prescription and acquiescence. Texas concurs in this part of his Report as to islands but excepts to his finding prior to the taking of such further evidence, that any presently existing islands which existed in 1812 were then owned by or within the jurisdiction of Louisiana.

The description in the Enabling Act of 1811 "beginning at the mouth of the river Sabine; thence by a line to be drawn along the middle of said river, including all islands to the thirty-second degree of latitude" (and thence setting forth the remaining boundaries to the north, east and south) is subject to the interpretation given by the Special Master, to-wit: That it gave all islands of the Sabine, both within and without such specific boundaries, to Louisiana. On the other hand, it is likewise subject to the interpretation that "including all islands" simply referred to all islands within Sabine waters east of the line to be drawn along the middle of the river, which we concede as including those intercepted by such middle line. The latter is the practical interpretation which has been placed on this boundary Act for many years by Federal, Louisiana and Texas agencies and officials, and there is other evidence which Texas would like to offer bearing on the legal effect of this practical interpretation by the parties before the Court makes a final determination as to whether islands west of the geographic middle line and

outside of the boundaries of Louisiana were intended by Congress to be granted to Louisiana in 1812.

We concede that it is possible for a State to own or have jurisdiction over islands outside of and beyond its boundaries. See *United States v. Louisiana, et al*, 363 U.S. 1, 66-80 (1960). Congress had the power to grant Louisiana islands outside of the boundaries which circumscribed the new State, but we do not believe this was the intention of the phrase "including all islands" as used in the Act of 1811. For instance, although the language may appear as surplusage if it only referred to islands east of or intercepted by the geographic middle line, it has been held that such is not the case. In both *Moss v. Ramey*, 239 U.S. 538 (1916) and *Scott v. Lattig*, 227 U.S. 229 (1913), this Court held that islands on the Idaho side of the navigable Snake River at the time of Idaho's admission to the Union were not a part of the bed of the stream or land under water, and therefore their "ownership did not pass to the State, or come within the disposing influence of its laws." In *Scott*, it was further said at 244:

"On the contrary, although surrounded by the waters of the river and widely separated from the shore, it was fast dry land, and therefore remained the property of the United States and subject to disposal under its laws . . ."

There are many instances of water boundaries whose limits clearly encompass islands to which there have been added specific references showing that the limits include *all islands* within such water boundaries. An example is found in the 1819 Treaty with Spain wherein the boundary of the United States was fixed at the west bank of the Sabine and the south banks of the Red and Arkansas Rivers, clearly placing all of such waters and their encompassed islands within the United

States, but to this description was added the specific provision that "all of the Islands in the Sabine and the said Red and Arkansas Rivers throughout the Course thus described, to belong to the United States." (Tex. Br. App., 7-9). Also, the boundary agreement between Georgia and South Carolina was specifically fixed as the northern branches of the Savannah and Tugalo Rivers, clearly leaving all islands to the south in Georgia, but a specific provision was added "reserving all the islands in the said rivers Savannah and Tugalo to Georgia."

The phrase in the 1811 Enabling Act "including all islands" is clearly secondary to the middle line and refers only to all islands east of the middle line and within the boundaries described in the Act. This was the precise interpretation placed on the "including all islands" phrase by the Attorney General of Louisiana in a previous brief filed in this Court in *U.S. v. Louisiana et al*, No. 10 Original," in which it was said:

"Those *limits* include all islands eastward of the middle of the River Sabine to the thirty-second degree latitude and also all islands within three leagues of the coast in the Gulf of Mexico." (22-23)

"However, the reference to the inclusion of islands within the limits of the state, whether in the east half of the River Sabine or within three leagues of the Gulf coast, should not confuse one's thinking with the fact that by boundary description in the Congressional Enabling Act of 1811, the 1812 Louisiana Constitution, and again in the Congressional Act of Admission of April 8, 1812, the purpose was to fix the territorial limits of the

"Louisiana's Supplemental Brief in Opposition to Motion for Judgment, pp. 22-24, *U.S. v. Louisiana, et al*, No. 10, Original, October Term, 1959. See quotations therefrom printed at pages 31-33, Brief for the State of Texas in Support of Motion for Judgment.

State of Louisiana, both landward and seaward and to include all islands within said limits." (24)

Complete reservation of this island question will involve very little of the land in controversy. Perhaps the extent of these small areas and our position concerning them would best be understood by observing the map of Sabine Lake prepared by the U.S. Geological Survey in cooperation with the State of Louisiana in 1957. (Tex. Ex. A, 25). The geographic mid-stream boundary is positioned by the black dashed line drawn through the Lake and into Middle Pass of the Sabine River. To the left and about four miles west of this line will be seen the point where the Neches River empties into Sabine Lake. Here will be observed a small speck designated as Dooms Island (formerly called Johns Island), which is the first mentioned by the Special Master as being claimed by Louisiana (Report, 35-36). "To the north is Stewts Island, which was a part of the mainland until it was cut off by the Intra-coastal Canal, and between Stewts and the Middle Pass (also called West Pass or West Fork) of the Sabine River is a line of spoil banks or man-made islands (such as Sydney Island) created by dredging of the deep-water Canal." If the Court approves the Special Master's finding as to the geographic mid-stream boundary, Louisiana apparently asserts no title to these artificial man-made "islands" or spoil banks. However, Louisiana does assert title to two small delta "islands", which Texas considers battures, shell banks or appendages of the shore, lying west of the geographic middle line as depicted by the U.S.G.S. and the State

"This four-acre "island" or shell bank was once considered by Texas as a part of the mainland and was actually surveyed and patented as part of a mainland grant. (Tex. Ex. K, 1-14). The testimony shows that it no longer exists. New Orleans Hearing Transcript, 243-300; 554-557.

"Tex. Ex. K, 10-11.

of Louisiana on the map above referred to. Together, these two areas appear to cover less than 100 acres. These are the only "islands" referred to by the Special Master and the only ones about which Texas is informed of any controversy.

The Special Master recognizes that even if these alleged "islands" existed in 1812 and were then granted to Louisiana, there is a possibility that they have since come under the jurisdiction and ownership of Texas by prescription and acquiescence and that he should be authorized to hear further evidence concerning them if and after the Court approves his basic boundary findings. It just so happens that these two appendages in the delta of the Sabine River border upon a portion of the geographic mid-stream boundary which has not only been marked on the U.S.G.S. and Louisiana maps since 1932, but which has been used by both States in metes and bounds descriptions of oil and gas leases which they have issued on each side of this recognized position of the boundary line. On April 21, 1938, Louisiana executed its mineral lease, signed by the Governor, to Humble Oil & Refining Company, covering the north 10,000 acres of the east half of Sabine Lake with attached field notes calling for the center of Middle Pass(West Fork) as its western boundary and as the eastern boundary of the State of Texas. (Tex. Ex. D, 15-19). The attached field note calls begin at the southeast corner of the lease on the east shore of Sabine Lake and thence run west to "the center of Sabine Lake, same being the Texas-Louisiana boundary as set out in an Act, approved July 5, 1848 . . . giving the consent of the Government of the United States to the State of Texas to extend her eastern boundary . . . Thence in a northeasterly direction with the center of said Lake to the mouth of the West Fork [same as Middle Pass] of Sabine River . . ." There was attached

a U.S.G.S.-Louisiana map showing this precise boundary line as shown on the map hereinabove referred to. (Tex. Ex. D, 17-19).

On the west side of this line, Texas executed a mineral lease on its Tract No. 3 to the Texas Company in 1958, which extended to the middle of Middle Pass (also known as West Pass or Fork) and including the two alleged islands in question west of Middle Pass. (See Map, Tex. Ex. F, 32; New Orleans Hearing Transcript, R. C. Wisdom's testimony, pp. 552-555).

Louisiana's alternative claim to title or jurisdiction over these small alleged islands came late in the development of this case. It was first made known to Texas at the oral arguments on Motion for Judgment in Houston on December 16, 1970. Texas included a partial reply in a letter to the Special Master, with attached exhibits, dated December 31, 1971 (Tex. Ex. J and K), and with some evidence of prescription and acquiescence in the subsequent New Orleans hearing (New Orleans Hearing Transcript, pp. 524-576). However, the issues as to these small alleged islands have not been thoroughly developed or briefed, it being Texas' contention from the beginning that if any such controversy should arise, the matter should be reserved for a future hearing after a decision on the basic boundary issues. (Plf. Reply Brief of December 10, 1970, pp. 30-31).

The answer to the question of what Congress intended in 1811 with respect to islands west of and outside the specific boundaries set forth for the State of Louisiana may depend to a great extent upon the subsequent practical interpretation of the boundary language by Federal agencies and the two States. Since this is proposed to be developed in subsequent hearings by the Special Master with reference to prescription

and acquiescence, there is good reason to reserve the entire question of initial and present ownership and jurisdiction over these small areas until additional evidence and briefs can be submitted at the proposed subsequent hearings.

RECOMMENDATION AS TO SURVEYING THE BOUNDARY

If the Special Master's basic boundary findings are approved by the Court and if the parties are unable to agree upon the location of the "geographic middle" of the Sabine within 30 days after the Court's order of approval, the Master recommends that he be authorized to make a survey thereof with the assistance of the U.S. Geological Survey, with the costs to be equally divided between the two States. Texas has no objection to this procedure, but we offer an alternative which would conform to the practical line which has been used by the States for many years and which would provide for a future survey only as to those portions of the boundary on which the parties cannot agree.

The alternative comes from the solution used by this Court in *Louisiana v. Mississippi*, 202 U.S. 1, 59 (1906), a water boundary case won by Louisiana largely upon proof of an existing boundary line depicted on the charts of the U.S. Coast and Geodetic Survey. The Court decreed the water boundary to be "as delineated on the following map, made up of the parts of charts Nos. 190 and 191 of the United States Coast and Geodetic Survey, embracing the particular locality." In the present case, we have in evidence official maps of the U.S. Geological Survey made in cooperation with the State of Louisiana beginning in 1932, which depict the geographic middle line of the entire Sabine from its mouth on the Gulf to the thirty-second degree of north latitude (Tex. Ex. A, 3-15, 26-

39, 40-45). These maps were found by the Special Master to "have been used extensively by both Texas and Louisiana as a basis for their maps." (Report, 33). In order that both States may continue the use of these maps with respect to the area in controversy until there is some need for additional surveying on a portion of the boundary, our alternative suggestion would be for a judgment and decree along the following lines:

"That the geographic middle of Sabine Pass, Sabine Lake and Sabine River from the mouth of Sabine Pass north to the thirty-second degree of north latitude, as depicted on the 1957 series of Sabine River Quadrangles prepared and published by the U.S. Geological Survey in cooperation with the State of Louisiana shall be the location of the boundary line between the two States unless and until either State petitions this Court, within one year of the date of this order, for a more definite survey of the location of any portion of said boundary. The Court retains jurisdiction of the case for such further orders as may be necessary in accordance herewith."

PRAYER

WHEREFORE, the State of Texas prays that the Report of the Special Master be in all things adopted and approved as the judgment of the Court, with the above alternative as to future surveys, and except for determination of the following matters in a subsequent report:

- (1) Whether any presently existing islands in the western half of the Sabine were in existence in 1812, and if so, whether they were initially incorporated by Congress into and as a part of the State of Louisiana.
- (2) Whether Texas has title to or jurisdiction over any such islands by reason of the Act of July 5, 1848

(9 Stat. 245) or by reason of prescription and acquiescence.

Respectfully submitted,
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August, 1972

CERTIFICATE

I, Crawford C. Martin, Attorney General of Texas, a member in good standing of the Bar of the Supreme Court of the United States, hereby certify that on the — day of August, 1972, I served copies of the foregoing Brief of the State of Texas in Support of the Report of Special Master by first class mail, postage prepaid, to the offices of the Governor and Attorney General, respectively, of the State of Louisiana.

CRAWFORD C. MARTIN
Attorney General of Texas

APPENDIX A
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OF TEXAS

Austin, Texas 78711

June 30, 1972

Honorable Preston Smith
Governor of Texas
Capitol Building
Austin, Texas 78711

**Re: Texas v. Louisiana, Boundary
dispute, offshore area**

Dear Governor Smith:

We have received the letter directed to you by Attorney General Guste of Louisiana under date of June 21, 1972, protesting the statements of the Director of our Parks and Wildlife Department that the Department intended to exercise regulatory jurisdiction over the east jetty at the gulfward mouth of Sabine Pass. We have looked into this matter and have discussed it with Mr. James U. Cross, the Executive Director of the Parks and Wildlife Department and make to you the following report:

(1) The assertions contained in the June 21st letter from Louisiana Attorney General Guste are substantially correct insofar as they relate to the present posture of the litigation between Louisiana and Texas and insofar as they relate to the fact that Texas and Louisiana mutually agreed that the disputed area gulfward from Sabine Pass was not to be decided in the present controversy and was to be settled later after the inshore boundary had been fixed by final judgment. By this agreement, neither state waived any claim in the disputed area. Neither Texas nor Louisiana should be doing anything in the disputed area different from what has been done in the past, whatever that may have been.

(2) In discussions yesterday between Mr. Robert Flowers of our office and Mr. James U. Cross, the situation was explained, and Mr. Cross assured us that until the gulfward claims are resolved the Texas Parks and Wildlife Department will not attempt to conduct any further operations in the disputed area.

We believe that Mr. Cross's statements reported in the Beaumont paper were due to a perfectly understandable misunderstanding of the nature of the present litigation, and his cooperation as assured to us in yesterday's conversation with him should be sufficient to allow a reassurance to the Attorney General of Louisiana that Texas will abide by its agreement as to operations in or upon any of the disputed area in the Gulf south of the mouth of Sabine River.

We presume that this will be sufficient to conclude this matter, but if further action is necessary, we are at your service to effect whatever is necessary to protect the rights of Texas and forestall any change in the status of the present litigation between Texas and Louisiana.

Sincerely yours,

CRAWFORD C. MARTIN

CCM:vg

cc: James U. Cross
Executive Director
Texas Parks and Wildlife Department
John H. Reagan Building
Austin, Texas 78711

July 3, 1972

Honorable William J. Guste, Jr.
Attorney General of Louisiana
Department of Justice
Baton Rouge, Louisiana 70804

Dear General Guste:

Attached is a letter which we believe is self-explanatory, from the Attorney General of Texas to Governor Preston Smith in response to our inquiry relative to your letter of June 21, 1972.

If we can be of further assistance in this regard please let us know.

Sincerely,

HAWTHORNE PHILLIPS
Legal Counsel to the Governor

HP/rg

Attach.

bcc: Carlton Carl

LE COPY
(D)

No. 36, Original

Supreme Court, U. S.
FILED

DEC 5 1972

MICHAEL RODAK, JR., CLERK

**In the
Supreme Court of the United States**

OCTOBER TERM, 1969

THE STATE OF TEXAS,

Plaintiff,

v.

THE STATE OF LOUISIANA,

Defendant.

**REBUTTAL BRIEF OF THE STATE OF
LOUISIANA IN ANSWER TO THE BRIEF OF
THE STATE OF TEXAS IN SUPPORT OF
THE SPECIAL MASTER'S REPORT**

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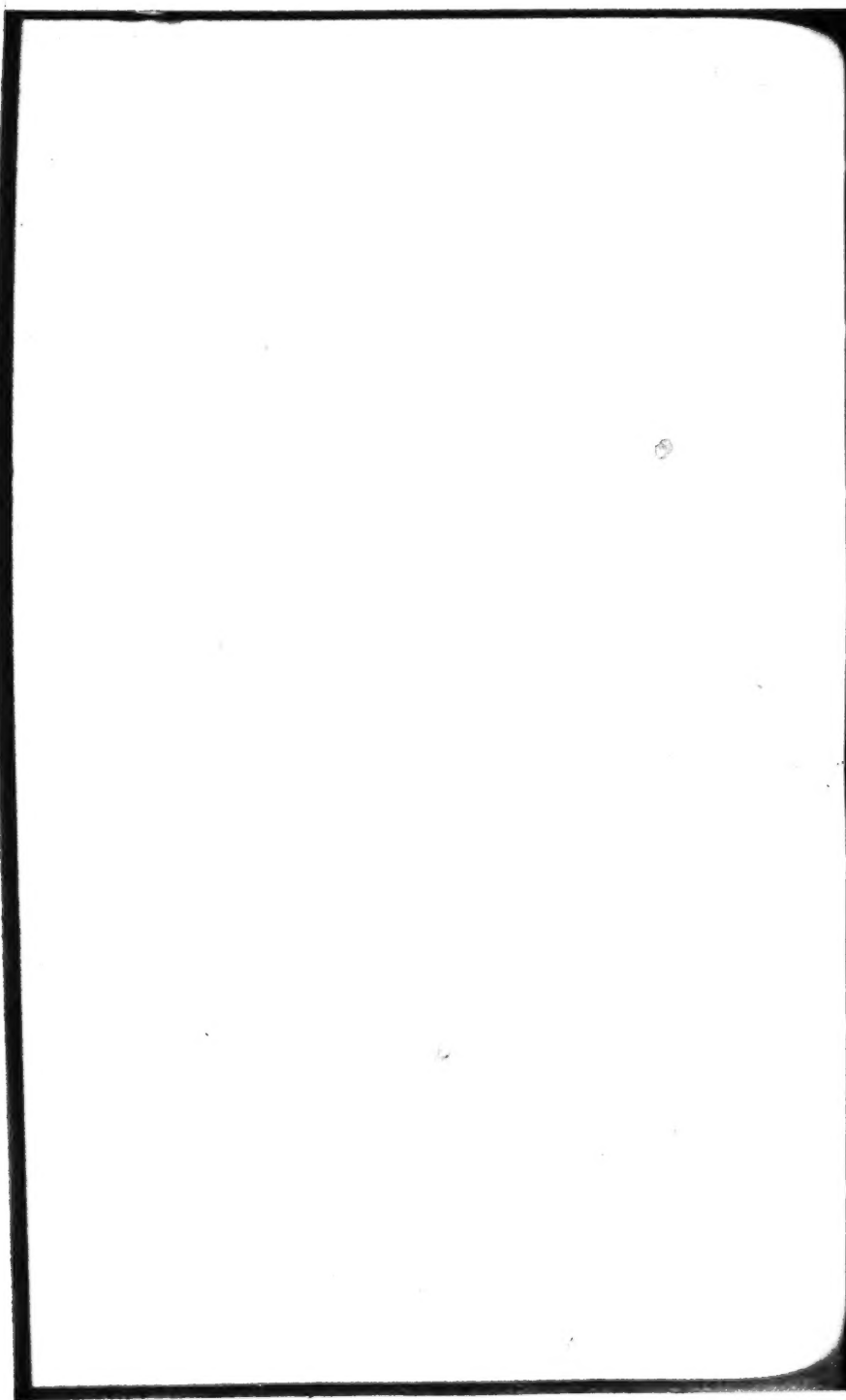
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Annual Report of the American Historical Association for the Year 1907. Garrison, ed., Diplomatic Correspondence of the Republic of Texas, Part II, p. 369-373	30
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Illustrated Atlas, Geographical, Statistical and Historical of the United States and the Adjacent Countries, by T. G. Bradford, Philadelphia, 1838, p. 147	23
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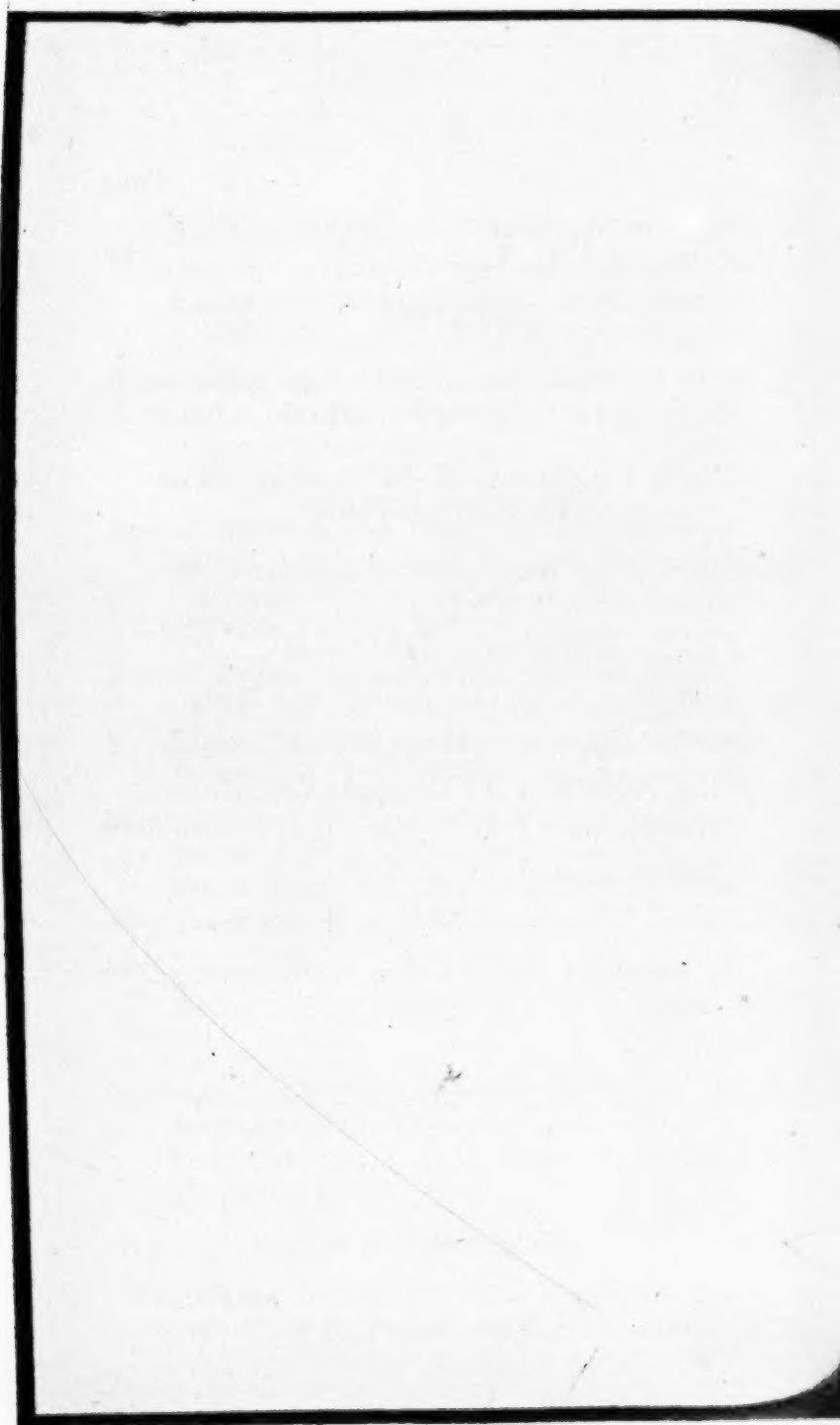
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No. 36, Original

In the

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OCTOBER TERM, 1969

THE STATE OF TEXAS,

Plaintiff,

v.

THE STATE OF LOUISIANA,

Defendant.

**REBUTTAL BRIEF OF THE STATE OF
LOUISIANA IN ANSWER TO THE BRIEF OF
THE STATE OF TEXAS IN SUPPORT OF
THE SPECIAL MASTER'S REPORT**

PRELIMINARY STATEMENT

While there have been several briefs written by both sides of this controversy, nevertheless, in view of the importance of this case in establishing the boundary between the State of Texas ("Texas") and the State of Louisiana, ("Louisiana"), and the effect that it may have on other cases decided and to be decided by this Court, establishing boundaries between other states where a navigable stream is involved, we are taking the liberty of filing this additional brief, with the hope that it may, with clarity, pinpoint the issues to be decided by the Court in this case.

POINT I

Texas, in filing this suit, limited the portion of

the boundary to be settled from the Gulf of Mexico to the 32nd degree of north latitude. The decision in this case will fix the point of departure and direction of the lateral boundary between Texas and Louisiana separating Louisiana's three marine miles submerged land claim from Texas' three league historical boundary in the Gulf. As to the remainder of the boundary from the 32nd degree of north latitude to the 33rd degree of north latitude, the Special Master ruled, in a memorandum opinion dated March 25, 1971, "The northern part of the boundary between the States [Texas and Louisiana] beginning at the Sabine River, has been established. Such is not now before the Special Master. The only disputed boundary involved in this case is that on the Sabine River."

(Insert ours) This means Louisiana's boundary from the 32nd degree north latitude to the 33rd degree of north latitude commences on the *west* bank of the Sabine River, and extends north along the Treaty Boundary of 1819.¹ If the report of the Special Master is accepted, there will be a jog in Louisiana's western boundary where the 32nd degree of north latitude intersects the Sabine River.

According to the findings of the Special Master, the southern portion of the boundary commencing at

¹ The "Treaty Boundary of 1819" and "Treaty of 1819" both refer to the Treaty of Amity, Settlement and Limits between Spain and the United States in 1819. When we refer herein to the Treaty Boundary of 1819, it includes the boundary as confirmed by the treaty between the United States and Mexico in 1828, between the United States and the Republic of Texas in 1838 and the boundary as surveyed and staked in 1840-41.

the 32nd degree of north latitude would commence in the geographic middle of the Sabine, whereas, the boundary of Louisiana north from the 32nd degree of north latitude would start on the west bank of the Sabine River. The anomaly of this ruling is that Louisiana's boundary from the 32nd degree of north latitude to the 33rd degree of north latitude follows the Treaty Boundary of 1819, and not the language contained in Louisiana's Constitution of 1812, on which Texas relies, while, according to the ruling of the Special Master, Louisiana is bound by the language of the Constitution of 1812, from the 32nd degree of north latitude south to the Gulf of Mexico, and is not entitled to the Treaty Boundary of 1819, as to that portion of its boundary.

POINT II

Another anomaly in this case is: Why does Texas, at this late hour, disclaim its tacit understanding with Louisiana not to push the boundary settlement pending litigation on the Tidelands issue? Texas, at page 32 of its brief stated:

"Louisiana asks the Court to take judicial knowledge of World War II, followed by the extended tidelands controversy during which it claims a 'tacit' understanding that this boundary controversy would not be pushed, as a reason for excusing its acquiescence and failure to file a lawsuit since 1941. While each party perhaps had its own good reason to delay filing a suit against its neighboring State, we disclaim any agreement, tacit or otherwise, which would have

prevented either State from filing a suit to resolve this question at an earlier date."

This statement cannot be reconciled with the evidence in the record.

Texas introduced in evidence as Exhibit "C", Item 13, a letter from Bolivar E. Kemp, former Attorney General of Louisiana, addressed to Price Daniel, then Attorney General of Texas, dated May 1, 1951, in which it was stated in the concluding paragraph:

"In conclusion, I might state that, informally, some few years ago, Mr. Madeen [Madden] mentioned the question to one or more officials of your state. It was their view, Mr. Madden informs me, that no action be taken until the settlement of the Tidelands controversy."

This letter of Mr. Kemp was written to Mr. Daniel in answer to a letter of Mr. Daniel, dated April 24, 1951, stating that it had come to his attention that Louisiana was asserting claim to the entire bed of the Sabine. It must be remembered that Governor Jones wrote the Governor of Texas in 1941, officially claiming, on behalf of Louisiana, the entire bed of the Sabine to the west bank. The letter of Bolivar Kemp confirmed that Louisiana was claiming to the west bank, and mentioned the correspondence of 1941. Before Bolivar Kemp inserted the concluding paragraph quoted above, he mentioned that, until trespasses had been made on its land, there would be no occasion to litigate the question.

When the present case was being argued before Judge Van Pelt, on December 16, 1970, Oliver P. Stockwell, one of the attorneys for Louisiana, in the presence of Mr. Daniel, stated:

"That is correct. But I would like to make this observation, that in Mr. Daniel's brief and in some of these exhibits they refer to actions that were taken by Louisiana in this Tideland litigation. Now you will find in even Mr. Daniel's exhibits a letter from Bolivar Kemp, who was Attorney General, that it was his impression while this Tideland litigation was pending which started in 1949 they were not going to try to adjust this boundary. I think Mr. Daniel will admit that. In other words, they didn't want to get this boundary between the two states involved in this litigation." [referring to the Tideland litigation] (Tr. pp. 78, 80 and 81.)

Again it was stated by Oliver P. Stockwell:

"If I might speak a little on acquiescence, of course the question of Port Arthur—most of this has been done since 1941, and during this period when we had this kind of understanding of not doing anything—they can't argue that they didn't know Louisiana's position then because the Governor wrote the Governor of another sovereign state, putting them on notice." (Tr. p. 107).

These remarks were not then disputed by Mr. Daniel.

Mr. Bonnacarrere, Secretary to the Mineral Board of the State of Louisiana, in his testimony, particularly at pages 141, 146, 148, 236 and 237, emphasized

the fact that there was a tentative agreement that no action would be taken on the Texas-Louisiana boundary until the Tidelands litigation was concluded. It must be remembered that Texas filed this suit *after* its Tidelands claim had been adjudicated by this Court, although Louisiana was and still is involved in litigation over its Tidelands.

Texas must consider its plea of acquiescence and prescription is on shaky grounds because most of the acts relied on by Texas took place *after* Governor Jones' letter in 1941.

POINT III

Another anomaly in this case is the holding by the Special Master that the portion of the boundary involved in this suit is in the geographic middle of the Sabine, which is contrary to the ruling of this Court in *State of Louisiana v. State of Mississippi*, 202 U.S. 1, 26 S.Ct. 405, 50 L.Ed. 913 (1906), which involved the interpretation of the same Constitution of Louisiana as it related to its eastern boundary. This Court, in that case, in establishing the boundary between Mississippi and Louisiana, interpreted the phrase, "in the middle of", as being in the "thalweg", and established the boundary between Mississippi and Louisiana in the deep water sailing channel. The Court also held that the "thalweg" doctrine applied to lakes, estuaries and bays and made it clear that once title had vested in Louisiana, Congress was powerless to deprive Louisiana of any of its territories without the consent of the Legislature of Louisiana.

POINT I: ARGUMENT

For the Court to fully appreciate the various actions taken by the United States and Louisiana during the early history of this boundary dispute, it is necessary to consider the topography and habitation of the area involved. Louisiana Exhibit K, Items 2, 7, 10 and 12 shows the land along the eastern shore of Sabine Pass, Sabine Lake and the lower end of Sabine River as low and marshy. From the survey plat made in 1901,² the Court will observe that towns were on the west bank of Sabine Pass, Sabine Lake and the lower Sabine River, but none exist on the east bank in this area. This is true even today, as the plats will show. On the west bank are the towns of Sabine City, Port Arthur, Orange and other smaller settlements.

Shortly after the Treaty of 1819, the Legislature of Louisiana adopted a resolution, in 1820, approved on March 16, 1820, providing:

"11. La. A., 1820, Resolution, p. 126 Approved March 16, 1820.

That the Governor be requested to correspond with the President of the United States, on the subject of running off and marking the western and northern boundary line of the State of Louisiana, to wit: the line beginning on the Sabine river, at the thirty-second degree of north latitude, thence running north to the northern most part of the thirty-third degree of latitude, thence along

² Louisiana Exhibit K, Item 7.

the same parallel of latitude of the Mississippi river."

This resolution referred to the landed portion of the boundary, which is now recognized as corresponding to the Treaty of 1819 boundary. There was no need at that time to survey the water boundary for Louisiana owned the bed of the Sabine as a sovereign state.

As we have already pointed out in our prior briefs, when the Parish of Caddo was created in 1838 (La. Ex. A, Item 16), the western boundary was established along the "boundary line of the United States", which was the Treaty Boundary of 1819. When the Parish of Sabine was created on March 7, 1843 (La. Ex. A, Item 18), the western boundary was on the west bank of the Sabine, following the line between the United States and the Republic of Texas, which was the Treaty Boundary of 1819. This was true also when the Parish of DeSoto was created in 1843 (La. Ex. A, Item 17). These were all *before* Texas was admitted into the Union as a state in 1845. These acts firmly established that the Louisiana Legislature accepted and recognized as its boundary the Treaty Boundary of 1819.

In our prior briefs, we have discussed the area known as the "neutral zone" created in 1806 by agreement between the United States and Spain,³ which lasted until the Treaty of 1819. This neutral zone en-

³ For a history of the "neutral zone" and the actions of the United States and Louisiana during this period of time, see Louisiana's brief in support of its exceptions to the report of the Special Master, particularly "Argument Point A".

compassed the portion of Louisiana's boundary involved in this suit.

Texas and the Special Master have ignored the effect of this agreement on the western boundary of Louisiana. This agreement was in effect when Louisiana was admitted as a state in 1812, and the admission of Louisiana as a state was subject to this prior agreement; this accounts for the fact that Louisiana was not able, until after the Treaty of 1819, to exercise any jurisdiction over this area.⁴ Congressman Poindexter stated it was up to the United States and Spain to settle the western boundary which would then become the permanent boundary of Louisiana.

This was a wild and ungoverned area, as the Court will observe in reading the article by Mr. Haggard.⁵ We have also taken the liberty of including in the appendix of this brief a chapter out of the biography of John A. Murrell by Ross Phares, which was published in 1941, entitled "Reverend Devil". The chapter is entitled, "The Free State of Sabine", the title given to the neutral zone. We have also included in the appendix an article by Leon Sugar on the same subject.

As the Court will observe in reading our prior briefs, the lands in the neutral zone were not patented until *after* 1820. Louisiana, recognizing the necessity

⁴ When the admission of Louisiana was debated in the U.S. Congress this agreement was recognized as binding on the United States and Spain and the admission of Louisiana as a state was subject to the agreement. (Louisiana Exhibit F, Item 5, p. 57)

⁵ Louisiana Exhibit C, Item 2.

to settle this area, passed the following resolution on March 25, 1824:

"Whereas from the topographical situation of this state, the defence afforded by the military force placed on our western frontier must be partial, and can effectually protect but a small part of the line of invasion, and whereas further, the only way to remedy that is to hold out advantages to the settlers of that part of the state generally known under the name of *neutral ground*.

"Resolved by the Senate and House of Representatives of the state of Louisiana, in General Assembly convened; That our Senators and Representatives in Congress be instructed to use their utmost endeavors to have a speedy confirmation of the claims filed with the said commissioners at Natchitoches, in December last and calling for lands definitively acted upon by congress within the said neutral ground, and that the secretary of state be directed to transmit to the said senators and representatives copies of this resolution.

"Approved, March 25, 1824." (Emphasis ours)
Surveys were then made and land patented in the neutral zone.⁶

When the boundary survey was made in 1840-1841, Mr. Overton, representing the United States, made observations concerning the lawlessness along the boundary being considered.⁷ All of this is important when this Court considers what the Legisla-

⁶ Louisiana Exhibit C, Item 3.

⁷ Louisiana Exhibit A, Item 13.

ture of Louisiana had in mind when it passed Resolution No. 212, approved on March 16, 1848 (La. Ex. A, Item 19). The preamble of the resolution states:

"Whereas the constitution and the laws^{*} of the State of Louisiana, nor those of any other State or territory, extend over the waters of the Sabine river from the middle of said stream to the western bank thereof; and that it is of importance to the citizens living contiguous thereto, and to the people in general, that the *jurisdiction of some State* should be extended over said territory, in order that crimes and offences committed thereupon should be redressed in a speedy and convenient manner." (Emphasis ours)

It is easy to understand why the Legislature felt this action should be taken, for the *jurisdiction* of Louisiana, as fixed by the language of the Constitution of 1812, extended only to the middle of the Sabine. There existed a serious question as to whether Louisiana could enforce its criminal laws in the west half of the Sabine, although Louisiana's boundary extended to the west bank, as fixed in the Treaty of 1819. The resolution then goes on to provide:

"Therefore be it resolved by the Senate and House of Representatives of the State of Louisiana in General Assembly convened, 1st. That the constitution and the jurisdiction of the State of Louisiana shall be extended over part of the United

^{*} In the preamble the Legislature was talking about the language of laws and the Constitution and not about Louisiana's western boundary, which, later in the same resolution, the Legislature recognized as being on the west bank of the Sabine.

States, embraced in the following limits (when-
ever the consent of the Congress of the United
States can be procured thereto,) viz: Between
the middle of the Sabine river and the western
bank thereof, to begin at the mouth of said river
where it empties into the Gulf of Mexico, and
thence to continue along the said western bank
to the place where it intersects the thirty-second
degree of north latitude, *it being the boundary
line between the said State of Louisiana and the
State of Texas.*" (Emphasis ours)

Here, again, the Legislature was recognizing that
the boundary line between Louisiana and Texas was
on the west bank of the Sabine, but that the jurisdic-
tion of Louisiana, as fixed by the language in its Con-
stitution of 1812, only extended to the middle of the
Sabine, but it extended jurisdiction to the west bank
subject to the consent of Congress.

The Court will recall that the inhabitants on both
sides of the Sabine, by virtue of the Treaty of 1819,
were entitled to the use and navigation of the water,
while by the same treaty the ownership of the river
was vested exclusively in the United States and thereby
in Louisiana, the most westerly state, to the left bank.
This situation, agreed upon in a solemn pact, did none-
theless pose questions of police jurisdiction.* The fact
that the Legislature stated, "shall be extended over part

* The Republic of Texas, distinguishing customs inspec-
tion on waters of the Sabine River from legal ownership of the
River, acknowledged thereby that any jurisdictional act or
series of acts would in no way imply at any future time owner-
ship by means of prescription. See the February 10, 1845, letter
of the Secretary of State for the Republic of Texas to A. J.
Donelson, U. S. Charge d'Affaires at the Texas Capitol. See
Appendix A.

of the United States" did not, in any way, mean the Legislature did not recognize Louisiana's boundary as fixed on the west bank of the Sabine, for, actually, the whole of Louisiana forms part of the United States.*

The resolution then requested the Louisiana Senators to ask Congress for permission for such extension. It is important to consider that in the resolution actually passed, it provides, in the last line in the second paragraph of the resolving portion of the resolution, "boundary line between the State of Louisiana and the State of Texas." In a copy of the resolution filed with the Congress, the "State of Texas" was left out.¹⁰

Recognizing the necessity for some established jurisdiction over the west half of the Sabine, the Legislature of Texas passed a resolution, approved March 18, 1848, to instruct its Senators and Representatives to use their best efforts to have Congress pass an act "extending the *jurisdiction* of Texas over half of the waters of Sabine Lake, Sabine Pass, Sabine River, up to the 33rd degree of north latitude." (Emphasis ours) Here, again, the Legislature of Texas was referring to "jurisdiction" over half of the waters of the Sabine, over which both Louisiana and Texas had concurrent

* To understand the intent of the Louisiana Legislature one can by analogy see that a coastal state owns at least three miles of area into the sea; yet this area is patrolled not by the State Police but rather by the United States Coast Guard. Conceivably waterborne federal police could have exercised special jurisdiction over the part of Louisiana's territory between the middle of the river and the west bank—without any derogation of Louisiana's ownership. Instead the lawmakers wished it to be policed by state authorities applying state laws upon this internal waterway.

¹⁰ Louisiana Exhibit A, Item 19, p. 288-A.

jurisdiction, under the provisions of the Treaty of 1819. Nothing is said about acquiring title to the west half of the Sabine.

Texas now urges that the Act of Congress which was accepted by Texas actually extended its boundary to the west half of the Sabine, depriving Louisiana of title thereto. While certain Louisiana Senators seemingly made no objection to the extension of jurisdiction of Texas over the west half of the Sabine, there was no consent by the Louisiana Legislature to changing the boundary of Louisiana from the west bank of the Sabine, as established by the Treaty of 1819, to the middle of the Sabine and any Act of Congress purporting to have this effect would be unconstitutional under the doctrine announced by this Court in the case of *State of Louisiana v. State of Mississippi*, supra.

There were settlements on the west bank of Sabine Pass, Lake, and River and Texas was in a much better position to police the west half of the Sabine than Louisiana, which had no settlements along these banks. Resolution No. 212 of the Louisiana Legislature of 1848, filed with Congress, firmly established Louisiana's boundary claim to the west bank.

Texas urged, and the Special Master found, that the United States was saving the west half of the Sabine to give to Texas when it was finally admitted into the Union. In our brief, we pointed out that the boundary of Texas and Oklahoma along the Red River is the 1819 Treaty Boundary, which is fixed on the south bank of the Red River, and not in the middle of the stream. Texas attempts to distinguish this situa-

tion from that in this case by urging that the Red River at this junction is non-navigable, whereas, both parties here have admitted that the Sabine is a navigable stream. While we do not agree with this distinction, such an argument certainly cannot be made with reference to that portion of the Red River which forms a part of the boundary between Arkansas and Texas.

The Arkansas Territory was formed by Act of March 2, 1819, effective July 4, 1819, from a part of the Missouri Territory. In 1824 an act was passed by Congress fixing the western boundary of the territory as follows:

" the western boundary line of the territory of Arkansas shall begin at a point forty miles west of the southwest corner of the State of Missouri and run south to the right bank of the Red River, and thence down the river and with the Mexican boundary,¹¹ to the line of the State of Louisiana."

Congress, in 1824, after the Treaty of 1819, considered that the line of Louisiana coincided with the boundary of Mexico, as established by the Treaty of 1819. Arkansas was admitted as a state on June 15, 1836. The enabling act approved on that date, describes the boundary as follows:

"beginning in the middle of the main channel of the Mississippi river, on the parallel of thirty-six degrees north latitude, running from thence west, with the said parallel of latitude, to the Saint Francis river; thence up the middle of the main

¹¹ This was the Treaty Boundary of 1819.

channel of said river to the parallel of thirty-six degrees thirty minutes north; from thence west to the southwest corner of the State of Missouri; and from thence to be bounded on the west, to the north bank of Red River, by the lines described in the first article of the treaty between the United States and the Cherokee nation of Indians, west of the Mississippi, made and concluded at the city of Washington, on the 26th day of May, in the year of our Lord one thousand eight hundred and twenty-eight; *and to be bounded on the south side of Red River by the Mexican boundary line*, to the northwest corner of the State of Louisiana; thence east with the Louisiana State line, to the middle of the main channel of the Mississippi; thence up the middle of the main channel of the said river, to the thirty-sixth degree of north latitude, the point of beginning." (Emphasis ours)

Congress, in passing this enabling act, recognized that Arkansas was bounded on the south side of the Red River, by the Mexican boundary line "to the northwest corner of the State of Louisiana; thence east with the Louisiana State line, to the middle of the main channel of the Mississippi River". This is just another instance in which Congress treated the Mexican boundary as coinciding with the western boundary of Louisiana and another instance in which the United States gave to the State of Arkansas the total of the Red River to its south bank. Again, this was *after* the Treaty of 1819 when the boundary had been settled first between Spain and the United States and, subsequently, Mexico and the United States.

In the case of *State of Oklahoma v. State of Texas*,

258 U.S. 574, 42 S.Ct. 406, 66 L.Ed. 771 (1921), the Court found "Lanesport, Ark., which is near the Oklahoma boundary, has been the usual head of navigation. . . ." This means this portion of the Red River was navigable.

The United States did not reserve the south half of the navigable portions of the Red River for a future state to be formed to the south, such as Texas. This establishes that there is no merit to Texas' claim that the United States was reserving the west half of the Sabine for Texas when it became a state.

It seems Texas' whole case is based on the theme that, from the date of the Louisiana Purchase, the United States established a firm policy of depriving Spain, and then Mexico, of Texas, so as to make it a part of the United States and give the new state half of the Sabine. While there might be some basis for this argument from comments of some statesmen, it was never the firm policy of the United States. As the Court will observe in reading the discussions between deOnis and Adams, in negotiating the Treaty of 1819, there was strong disagreement between them as to whether Texas formed any part of the Louisiana Purchase, and as to the exact location of the western boundary. (See: Marshall, "A History of the Western Boundary of the Louisiana Purchase", filed in evidence as Louisiana Exhibit M)

The Geological Survey Bulletin 1212, "Boundaries of the United States and the Several States," filed in evidence by Texas as Exhibit H., contained the following plat:

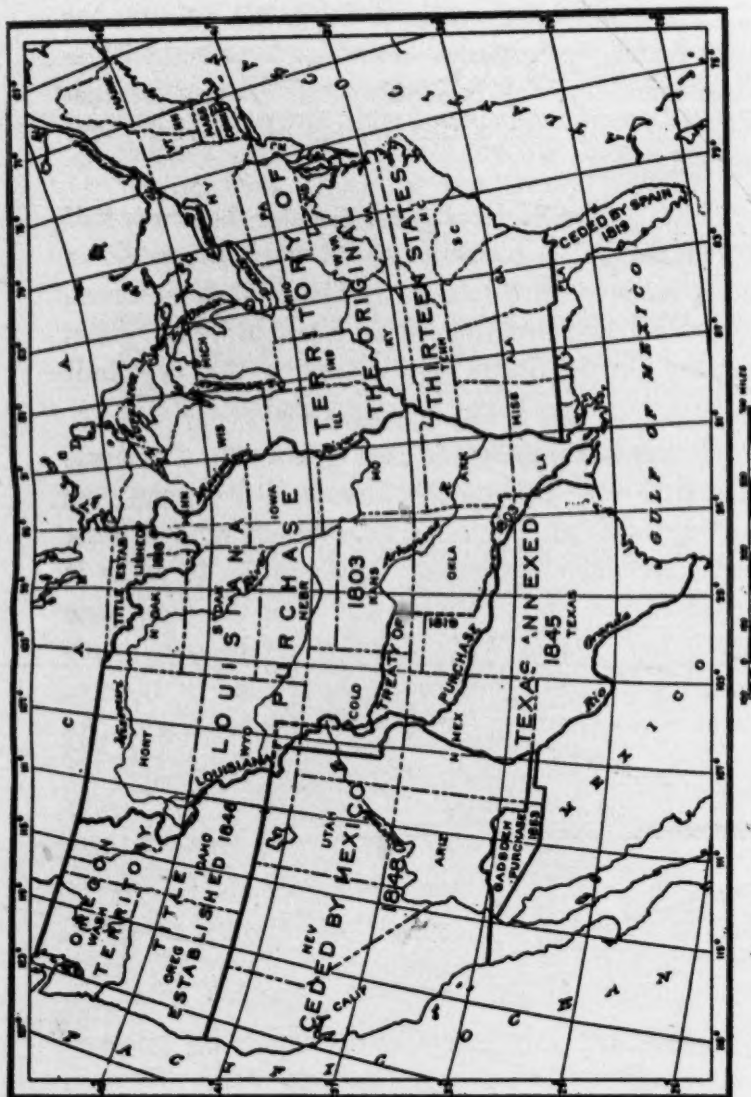


FIGURE 3.—Conterminous United States, showing accessions of territory from 1803 to 1853.

This plat shows territory acquired by the United States from 1803 to 1853; it shows that the original Louisiana Purchase extended from a line near the Atchafalaya River across Louisiana; and that the area involved in this suit was acquired by Louisiana in the Treaty of 1819.

In an interesting article published in the Southern History Association Journal, Volume V, September, 1901, No. 5, by Professor John R. Ficklen, entitled, "Was Texas Included In The Louisiana Purchase?", the writer, in the conclusion of that article, stated:

"In reviewing calmly the facts that have been given in the preceding pages it seems to the writer a correct conclusion to declare that the present State of Texas has no just claim to be regarded as a part of the territory purchased from France in 1803. As we have seen, that claim rests upon the fact that in the year 1685 the adventurous LaSalle, who three years before had taken possession in grandiloquent terms of the Valley of the Mississippi and of the coast as far as the River of Palms in Mexico, landed by accident on the coast of Texas and there planted a colony. This colony by the next year had dwindled from 185 to 45 persons and in the following year only about twenty of these were left. LaSalle had not proposed to settle on that coast, and it was his intention to remove his dwindling colony as soon as possible, to the banks of the Mississippi. Before this intention could be carried out, he was killed, and his settlement was destroyed by the Indians.

"As soon as the Spaniards learned of what they regarded as an invasion of their rights, they sent a strong force into Texas, and carried off all the members of LaSalle's colony that they could find among the Indians—an act for which they were never called to account by France. They then proceeded to plant missions and a presidio in Texas (1690). After three years these were abandoned; but twenty-three years later, when the French once more threatened occupation, the Spaniards took permanent possession of Texas and with missionaries and colonists they held it against the French for forty-six years—until, in fact, all contention was quieted by the transfer of Louisiana to Spain.

"Spain had also a claim of prior discovery, weak until reinforced by occupation; but she based her strongest claim on the exclusion of the French from the soil of Texas during a long period and upon the fact that between Adaes (Adais) and Natchitoches a boundary line was practically agreed upon. The French, it is true, had protested on several occasions against Spanish occupation, but to borrow a term from international law, this seem to the Spaniards like establishing 'a paper blockade' around Texas, and they very properly refused to recognize a claim which France never enforced. It is noteworthy that LaSalle's settlement had no real significance in the history of Texas.

"In the nomenclature of town and river, in the government and life of the people, no influence, with one slight exception, save that of Spain, can be detected until the American settlers came

crowding into the province during the nineteenth century. As to the maps, we have seen that they differ so much as to the limits of Louisiana that they neutralize one another. The curious phenomenon has been noted that the best Spanish map (Lopez's) gives (doubtfully) Texas to the French; while the best French maps (Vaugondy and D'Anville) give it to the Spaniards!

"Finally the treaty, it is to be remembered, by which the United States acquired Louisiana gave it 'with the extent it now has in the hands of Spain and which it had when France possessed it.' Now, as 'Louisiana in the hands of Spain' never embraced Texas under its government, it would certainly seem that by this clause our country was precluded from advancing a claim to the province. The two clauses should be regarded as reinforcing each other in support of the Spanish claim.

"The Floridas and Oregon, which at various times, were claimed by the United States as portions of the Louisiana Purchase, have been declared by the sober judgment of history to have formed no part thereof. A similar judgment, it may be predicted, will finally be pronounced in the celebrated case of the Louisiana Purchase vs. Texas."

This demonstrates that there is proof that the area of Louisiana encompassed in the neutral zone was not part of the Louisiana Purchase and the title to that area was only firmly settled by the Treaty of 1819. This is another reason why the western boundary of Louisiana was not established until the Treaty of 1819.

We are not talking about the United States transferring territory to Louisiana after it became a State; we are talking about the establishment of a boundary which was unsettled at the time Louisiana became a state and could not be fixed permanently in view of the agreement of 1806 between Spain and the United States. When the boundary was established by the Treaty of 1819 between the United States and Spain (the only two parties with authority to make such a settlement) that boundary then became the western boundary of Louisiana,¹² and no action subsequent to that time by the United States could deprive Louisiana of this boundary. The only serious question in this case is whether Texas acquired the west half of the Sabine by acquiescence and prescription, when both Louisiana and Texas had concurrent jurisdiction over the total Sabine?

Texas has not produced any creditable evidence from an official source of the United States that it was not the intention of the United States, when it negotiated the boundary settlement in 1819, to fix Louisiana's western boundary. Louisiana was not acquiring any property by "donation", "coalescence", or "osmosis", as Texas argues, but was having its boundary established. The official acts of the United States from that day forward justify this position.

The official plat filed by the Commission that

¹² This was recognized by Congress and the two statesmen most familiar with the boundary, Secretary of State Henry Clay and President John Quincy Adams. See pages 20-22 of Louisiana's Brief in Support of Exceptions to Report of the Special Master.

made the survey in 1840-41 shows the State of Louisiana on one side and the Republic of Texas on the other. It did *not* purport to show the west half of the Sabine between these two entities as the territory of the United States.

After the survey of 1840-1841, the United States resurveyed the townships from the 32nd degree of north latitude to the 33rd degree of north latitude, establishing the west boundary of Louisiana as coinciding with the treaty boundary of 1819. Actually, Louisiana lost territory by the resurvey in this area that was formerly thought to belong to it.¹³

The first resurvey was made on December 23, 1845, by George W. Morris, Deputy United States Surveyor, and the next resurvey was made by J. R. Barbour, Deputy United States Surveyor, in 1895. Both of these surveys show that Louisiana's boundary coincided with the treaty of boundary of 1819, as surveyed and staked.

T. G. Bradford's *Illustrated Atlas, Geographical, Statistical and Historical of the United States and the Adjacent Countries*, published in Philadelphia in 1838, entered, according to Act of Congress, in the year 1838 in the clerk's office of the clerk of court of Massachusetts describes the boundaries of Louisiana (page 147):

"STATE OF LOUISIANA

EXTENT. BOUNDARIES. The State of Lou-

¹³ Pp. 24-25 of Louisiana's Brief In Support of the Exceptions to the Report of the Special Master.

isiana comprises that part of the old Territory of Louisiana which lies south of 33° N. Lat., and the section of the Province of West Florida west of the Pearl River, and south of 31° N. Lat. The western bank of the Sabine from its mouth to the 32d parallel, and a straight line drawn thence due north to the 33d parallel of latitude, form its western boundary, the latter parallel is its northern limit to the Mississippi; that river is its eastern boundary to 31°, and Pearl River from thence to its mouth.”¹⁴

While Texas, in its brief, quotes arguments by attorneys of Louisiana that appeared in the Public Land Decision of 1910, (Item 1 in Texas' Exhibit B) nevertheless, the Commissioner determined:

“The West bank of the western channel of the river at this point will be recognized as the boundary between the State of Louisiana and Texas.”

The Commissioner then went on and said:

“The Supreme Court of the United States has sole jurisdiction to finally determine the question of disputed boundaries between States. (Virginia v. Tennessee, 148 U.S. 503) No decision that may be made herein would be binding upon the States. But it is the duty of the Department to determine whether the lands in question are part of the public domain and whether they are of the character of lands that pass to the State of Louisiana

¹⁴ See letter of November 8, 1972 from Walter W. Ristow, Chief, Reference Department, Geography and Map Division, The Library of Congress to Emmett Sole, to which is attached a copy of the 1838 map of Louisiana, showing Sabine Lake in Louisiana, all of which is part of Appendix A hereto.

under its grant of swamp and overflowed lands. For that purpose it must determine for itself what boundary should be recognized, and such determination must be made according to the elementary rules that control in the question of disputed boundaries.

“The true line in a navigable river between States of the Union which separates jurisdiction of one from the other is the middle of the main channel of the river. If there be more than one channel of a river, the deepest channel is the mid-channel for the purpose of territorial demarcation (*Iowa v. Illinois*, 147 U.S., 1) That is also the rule as between nations if there be no convention respecting it (*Handly v. Anthony*, 5 Wheat. 374; *U. S. v. Texas*, 162, U.S., 1)

“But that rule has no application in this case, for the reason that the boundary between the Republic of Texas and the United States was fixed by convention. Furthermore, the river was not the boundary, but the boundary between said Republic and the United States was the west bank of the river, and such boundary continued to be the east boundary of Texas until the act of July 5, 1848, when the United States consented that the State of Texas may extend its limits from the western bank of the river to the middle of the stream. *It can not be presumed, however, that the United States intended by such legislation to take from the State of Louisiana any part of its territory or to change in any respect the boundaries established by the act of its admission, even if it had authority to do so.* (*Louisiana v. Mississippi*, 202 U.S., 1, 40.)

"You will execute the instructions given in the letter of December 2, 1907." (Emphasis ours)

In a letter from the Assistant Commissioner of the General Land Office of the Department of the Interior to Mr. S. A. Mayo, dated March 31, 1932, filed as Texas' Exhibit B, Item 6, the Assistant Commissioner again affirmed the ruling in the 1910 case involving the boundary of Louisiana by saying:

"In the case of the State of Louisiana (39 L.D. 63), the facts with reference to the boundary line between Louisiana and Texas were set forth at some length and it was held (syllabus) that

'For the purpose of determining whether certain islands lying between the two channels of the Sabine River at a point known as the "Narrows" are part of the public domain and of the character of lands that pass to the State of Louisiana under its Swamp land grant, the west bank of the western channel of the river at this point will be recognized as the boundary between the States of Louisiana and Texas.'

"This would appear to fix the boundary line through Sabine Lake, no differentiation between the river and the lake having appeared in any of the treaties or acts of Congress, supra."

This clearly evidenced the position of the Department of the Interior that the boundary of Louisiana was on the west bank of the Sabine, including the west bank of the Sabine Lake even after the passage of the Act of 1848.

Louisiana filed in evidence a composite map furnished it by Texas dated sometime after 1896 (Lou-

isiana Exhibit F, Item 1) which affirmatively states thereon that in 1819 "the boundary between *Texas* and *Louisiana*" was fixed by the Treaty of 1819.

As late as 1960, former Attorney General of Texas Will Wilson recognized before this Court that the Treaty of 1819 "fixed the boundary between Texas and Louisiana." (Louisiana Exhibit H, Item 1 and page 53 of Louisiana's Brief in Support of the Exceptions to the Report of the Special Master.)

The only Act of the Federal Government on which Texas relies is the Act of 1848, permitting it to extend its boundary to the middle of the Sabine, which, we urge, only extended the jurisdiction of Texas to the middle of the Sabine, since Louisiana already owned to the west bank of the Sabine.

We urge that Louisiana's boundary was on the west bank of the Sabine, by virtue of the Treaty of 1819, when Texas was admitted into the Union in 1845. Louisiana's boundary is still on the west bank of the Sabine.

POINT II: ARGUMENT

Texas is attempting to deprive Louisiana of its land extending from the middle of the Sabine to its west bank. We have already discussed Texas' change in its understanding with Louisiana not to push the boundary controversy pending the Tideland litigation. Most of the acts relied upon by Texas took place *after* 1941, which may account for this change.

Neither Texas, in its briefs, or the Special Master

in his report, has answered Louisiana's argument that the Treaty of 1819, granting the inhabitants of both sides of the Sabine the "use" and "navigation" of its waters, vested concurrent jurisdiction in Louisiana and Texas over the waters of the Sabine.

This reserved treaty right was considered by the Republic of Texas in correspondence with the United States just prior to the date the Republic of Texas was admitted into the Union as a state. Only the United States has authority to deal with a foreign nation under the United States Constitution. It also controls navigation in navigable rivers even though the river is wholly located within a state and the title to the bed of the river is vested in the state. Even though Louisiana owned the bed of the Sabine to its west bank, it was proper for the Republic of Texas to deal with the United States in connection with the "use" and "navigation" of the waters of the Sabine.

The Republic of Texas sought to exercise some forms of jurisdiction by the right to "use" over the Sabine while acknowledging thereby that the ownership of the entire Sabine belonged and would continue to belong to the United States. Texas implicitly pledged never to claim any ownership rights based on prescription through "use".

On May 30, 1839, David G. Burnet, Acting Secretary of State of Texas, wrote to Richard G. Dunlap, Minister of the Republic of Texas to the United States, directing him to ask the United States Government for permission for Texas customs officials to examine

all ships entering the Pass of the Sabine. From *Annual Report of the American Historical Association for the Year 1907*. George P. Garrison, ed., *Diplomatic Correspondence of the Republic of Texas*, ([Wash., 1908], Part I, p. 400).

Dunlap reported to Texas President M. B. Lamar that the United States Secretary of State John Forsyth was unwilling to concede this right of search within its territorial waters. (Dunlap to Lamar, July 21, 1839, in Garrison, ed., *Diplomatic Correspondence of the Republic of Texas*, I, 411.)

Three years later—August 28, 1842—George W. Terrell, Acting Secretary of State of the Republic of Texas, instructed Isaac Van Zandt, Texas' Charge d'Affaires in Washington, to press the issue again with the United States Government. (Garrison, ed., *Diplomatic Correspondence of the Republic of Texas*, I, 602.) To halt "flagrant violations of [Texas'] revenue laws with perfect impunity," Texas was explicitly requesting United States trading vessels to be obliged to submit to Texas customs inspection in the Sabine Pass. Texas was implicitly recognizing that this inspection, which was normally a part of territorial jurisdiction, would, if graciously granted, not be so considered; that is to say, Texas was willing to recognize that no act of jurisdiction granted to her under the title of "use" would ever be a pretext for invoking prescription.

Texas insisted that customs inspection was necessary lest the port of Sabine become a free port of the world and lest commerce by keel boats a few feet off

shore make a mockery of Texas' commerce regulations. Use of a thing includes the means without which use would be useless, wrote Texas Secretary of State Ashbel Smith to A. J. Donelson, United States Charge d'Affaire at the Texas Capitol, February 10, 1845. [*Garrison, ed., Diplomatic Correspondence . . . II, 355-358.*] (See Appendix "A", hereto for copy of letter from Smith to Donelson.) Texas' revenue laws had to be safeguarded. "A limited jurisdiction for this purpose must be exercised by Texas over the adjacent waters." (*Ibid.*, p. 357). Donelson rejected the claim to inspection as a right but looked forward to an agreement which would protect Texas' rightful interest. (Donelson to Ebenezer Allen, Attorney General of Texas and Secretary of State ad interim, April 7, 1845, *Garrison, ed., Diplomatic Correspondence, II, 369-373.*)

It is obvious that the Republic of Texas recognized that some type of agreement was necessary to govern the "use" and "navigation" of the Sabine, since both nations had jurisdiction over the use and navigation of the Sabine.

The United States authorized Texas to extend its *jurisdiction* to the middle of the Sabine. This meant that where both Texas and Louisiana had concurrent jurisdiction over the "use" and "navigation" of the Sabine, with *Louisiana owning the bed and subsoil of the Sabine to the west bank*, the United States extended the jurisdiction of Texas to the middle of the Sabine so that both states would have the right to

regulate the "use" and "navigation" of the Sabine at least to the middle thereof. This took the place of a compact between Texas and Louisiana. Texas and Louisiana recently entered into a compact with the approval of Congress as to a portion of the Sabine known as the Toledo Bend Project.¹⁵

At page 36 of our brief in support of Louisiana's exceptions to the report of the Special Master, the case of *State of Washington v. State of Oregon*, 214 U.S. 205, 29 S.Ct. 631, 53 L.Ed. 969 (1909) is cited. In that case, this Court affirmed, on rehearing, its previous decision reported in 211 U.S. 127 (1908). The language of the decision, which is quoted on page 36 of our aforementioned brief, held that the grant of concurrent jurisdiction over the Columbia River, by Congress, did not determine the boundaries between the two states. By the same reasoning, the grant of *jurisdiction* to Texas to half the Sabine did not divest Louisiana of ownership of the bed and subsoil of the Sabine to the west bank.

The Court cited *Nielsen v. State of Oregon*, 212 U.S. 315, 29 S.Ct. 383, 53 L.Ed. 528, (1909), which pointed out that the Act of Congress of March 2, 1853 (c. 90, 10 Stat. at L. 172), organized the Territory of Washington and gave the Territories of Washington and Oregon "concurrent jurisdiction" over all offenses committed on the Columbia River which was the boundary between the two states. The act admitting Oregon as a state dated February 14, 1859 (c.

¹⁵ Louisiana Exhibit A, Item 23.

33, 11 Stat. at L. 383), gave concurrent criminal and civil jurisdiction of all cases on the Columbia River to Oregon. This is another instance where Congress, by granting concurrent civil and criminal jurisdiction to two adjoining states, did not fix ownership of the bed and subsoil thereto.

There are a number of other situations in which the courts have had to construe treaties, compacts and statutes between states and territories wherein "jurisdiction" was granted over all or part of water bodies without changing the boundary, but in our research we have failed to find any case discussing concurrent jurisdiction where the inhabitants of both states have equal rights in the "use" of the water. This is one more strong case why the United States should regulate the jurisdiction over the "use" and "navigation" of the waters without effecting Louisiana's boundary.

When this case is viewed in the light of the treaty provisions granting to the inhabitants of both sides of the Sabine the equal "use" and "navigation" of the waters, it is quite clear why there was no need for Louisiana to institute suit against Texas to have its west bank boundary recognized. This accounts in large measure for the maps relied on by Texas which have lines in the approximate middle of the Sabine.

Texas relies on numerous maps made for various purposes, largely *after 1941*, as constituting acquiescence by Louisiana to a midstream boundary. Judge Van Pelt, in his report, recognized that these maps

were not made for the specific purpose of establishing the boundary between Texas and Louisiana. Texas was thoroughly familiar with Louisiana's claim and was not misled in any way by any of these maps, statements of some of Louisiana officials, and other unofficial acts of Louisiana in its effort to establish a midstream boundary.

In our brief we pointed out that after the Special Master's report Texas, through James U. Cross, Executive Director of the Parks and Wildlife Department, publicly stated that the big difference created by the Special Master's report on the boundary:

"begins where the land ends.

The line forming the border leaves the mouth of the Sabine River about midway between Texas Point and Louisiana Point, which are the southernmost points of land in the two states, and runs southeasterly, roughly toward the 18-mile light.

The reason for this is the mouth of the old Sabine River traveled in that direction, thus establishing a southeasterly direction for the border extending into the Gulf.

The jetties turn and run in a more southerly direction at that point. Thus the base of the east jetty and a short piece of the jetty extending into the Gulf still lies within Louisiana.

But the remainder of the East jetty, including the safety pass, is in Texas.

The new border is not marked by any visible means.

Cross indicated that Texas game management officers will start patrolling the newly acquired area." ¹⁶

Here is another instance in which Texas is trying to use a line drawn on a map from the Gulf of Mexico north through the Sabine Pass, Sabine Lake and Sabine River, but disregarding the line on the same map as it extends into the Gulf. This is the type evidence that Louisiana respectfully urges should not be sufficient to deprive Louisiana of its valuable property rights consisting of the bed and subsoil of the west half of the Sabine.

POINT III: ARGUMENT

The Special Master stated (p. 31)

"The general rule is that when a navigable river constitutes the boundary between two States, the jurisdiction of each State extends to the middle of the main channel of the river. This is known as the 'thalweg' or main navigable channel doctrine. The doctrine is based upon equitable considerations and is intended to preserve to each State its equal right in the navigation of the stream *Iowa v. Illinois*, 147 U.S. 1, 7-8 (1893); *Georgia v. South Carolina*, 257 U.S. 516, 521 (1922); *Arkansas v. Tennessee*, 310 U.S. 563, 571 (1940). Where navigation of the river is not involved, there is no reason to apply the thalweg doctrine and 'in the absence of convention or controlling circumstances to the contrary, each takes to the

¹⁶ See: Brief of Louisiana in Support of the Exceptions to the Report of the Special Master, Appendix, Item 4.

middle of the stream.' " *Georgia v. S. Carolina*, supra.

Following this, the Special Master commented on the fact that both states concede that they have common rights of navigation on the Sabine by virtue of Section 12, Act of Congress, dated February 15, 1811, the Congressional Act admitting Louisiana as a state (April 8, 1812, 2 Stat. 701) and the 1819 Treaty between the United States and Spain (8 Stat. 252).

An analysis of *State of Georgia v. State of South Carolina*, 257 U.S. 516, 42 S.Ct. 173, 66 L.Ed. 347 (1922) reveals that this case has been cited only eight times. The final decree in this case (259 U.S. 572) reads:

"2nd. Where there are islands, the line is midway between the island bank and the South Carolina shore when the water is at ordinary stage; 3rd. That all islands formed by nature in the Chattooga River are reserved to Georgia as completely as are those in the Savannah and Tugaloo Rivers."

In denying the application of the Thalweg Doctrine, the Court cited the Beaufort Convention between Georgia and South Carolina from which the following is quoted:

"The navigation of the river Savannah at and from the bar and mouth (here follows a detailed description of the course of the river)—is hereby declared to be henceforth equally free to the citizens of both states, and exempt from all duties, tolls - - -"

It also quoted from a South Carolina resolution of 1852 to the effect that the Beaufort Convention fixed the boundary between the two states as "the thread or middle of the most northern branch or stream of the rivers Savannah and Tugaloo, where these rivers have more than one branch or stream, and the thread or middle of these rivers where there is but one branch or stream".

South Carolina had admitted in its answer that where there were no islands the line was the "middle thread of the stream where the rivers flow in one stream or volume." Later South Carolina sought to repudiate this and argued that the true boundary was the low-water mark on the southerly or Georgia bank of each river, and where there were islands, it was on the southerly bank of the most northerly stream or branch of the river, while conceding all islands in the Savannah and Tugaloo to Georgia (but not in the Chattooga).

This Court held that, as the Beaufort Convention fixed the *geographic* middle of the Savannah, Tugaloo and Chattooga Rivers (one continuous stream) as the boundary, the *thalweg* rule did not apply. This case should not be considered as a strong precedent for South Carolina practically "admitted itself out", as it sought to reverse itself in the light of its own pleading.

Of the eight instances—according to Shepard's Citations—in which that case has been cited, not one of them involved this particular point. Two of the

eight cases involved only procedural points.

The Special Master may have been technically correct when he relied on *State of Georgia v. State of South Carolina* in support of his statement at page 32:

"Since the right of navigation of the Sabine is not an issue here, having at all times been open to the citizens of each State, application of the thalweg doctrine is unnecessary."

The Special Master further said (p. 33):

"Since Congress had provided for *free navigation* on the Sabine as early as February 15, 1811 (Texas' Exhibit G. pp. 47-50), the only logical meaning to the words 'thence by a line to be drawn along the middle of said river,' found in the congressional act which defined Louisiana's western boundary (Louisiana's Exhibit A, pp. 66-68), would be a geographic middle." (Emphasis supplied)

In our brief in support of the exceptions to the report of the Special Master, we naturally countered his argument with the fact that our case is not like that case because, in that case, the Beaufort Convention set the boundary at the middle of the Savannah River, whereas, the Treaty of 1819 set the Texas-Louisiana boundary on the western bank of the Sabine water system.

It is submitted that a valid answer to the holding of the Special Master on the thalweg point also lies in an analysis of the case *State of Louisiana v. State of Mississippi*, *supra*. As we have pointed out in prior briefs, this case held that the boundary be-

tween Louisiana and Mississippi lay in the middle of the main channel from the Pearl River through Lake Borgne, Mississippi Sound and on into the Gulf of Mexico. This meant the "thalweg."

The fact of greatest significance is that the same constitution—that of Louisiana of 1812—was involved in *State of Louisiana v. State of Mississippi*, supra, as is involved in the case at bar. The Enabling Act of Congress which authorized the admission of Louisiana into the United States specified that the navigation of the water boundaries of Louisiana would be "common highways, and forever free, as well to the inhabitants of other states and the territories of the United States". At that time Mississippi was not a state, but constituted one of the territories of the United States. Obviously, this act of admission by the parent sovereign guaranteed to the citizens of Louisiana, and all other states and territories, free rights of navigation. This is exactly the same thing that the Beaufort Convention did as between South Carolina and Georgia. At the risk of repetition, the following is quoted verbatim from the Act for Admission of Louisiana as a State dated April 8, 1812:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the said state shall be one, and is hereby declared to be one of the United States of America, and admitted into the Union on an equal footing with the original states, in all respects whatever, by the name and title of the state of Louisiana; Provided, That it shall be

taken as a condition upon which the said state is incorporated in the Union, *that the river Mississippi, and the navigable rivers and waters leading into the same, and into the gulf of Mexico, shall be common highways, and for ever free, as well to the inhabitants of said state as to the inhabitants of other states and the territories of the United States, without any tax, duty, impost or toll therefor, imposed by the said state; and that the above condition, and also all the other conditions and terms contained in the third section of the act, the title whereof is herein before recited, shall be considered deemed and taken, fundamental conditions and terms, upon which the said state is incorporated in the Union.*"

The query is: Why was the Thalweg Doctrine followed in *State of Louisiana v. State of Mississippi*, supra, when there was no more "necessity for it" than there was in *State of Georgia v. State of South Carolina*, supra. Both the Convention and the Act, which apparently are of equal dignity, granted neighboring states and territories equal rights of navigation.

It is interesting to note how similar the language of the Beaufort Convention is to the language contained in the Act of Admission of Louisiana as a state. Unquestionably, when Mississippi was admitted into the union, as authorized by the Act of Congress of March 1, 1817, 3 Stat. Ch. 23, p. 348, she was entitled to all rights of navigation in the water boundaries between that state and Louisiana as they were "common highways, and forever free as well to the inhabitants of said state as to the inhabitants of other states and

the territories of the United States ***". At that time Mississippi was a territory.

Interestingly enough, the constitution of Mississippi does not adopt the rule of the Thalweg.

The Act of Admission of Mississippi into the union does not contain any provision for free navigation by neighboring states and territories, as does the act admitting Louisiana. This could hardly make any difference, as Mississippi's right to free navigation was recognized in the Act of Admission of Louisiana. The Act of Admission of Mississippi gives the south and eastern boundaries of Mississippi as follows:

"Thence westerwardly, including all the islands within six leagues of the shore, to the most eastern junction of Pearl River with Lake Borgne, thence up said river to the thirty first degree of north latitude, thence west along the said degree of latitude to the Mississippi river, thence to the point of beginning."

As pointed out in our brief on page 49, in *State of Arkansas v. State of Mississippi*, 250 U.S. 39, 39 S.Ct. 422, 63 L.Ed. 832, (1919), this Court disregarded holdings by the Supreme Court of Mississippi expressing belief that the geographic middle of the river was the correct boundary, rather than the thalweg, or main navigable channel. As has just been pointed out, even the Constitution of Mississippi appears to fix the boundary in the geographic middle.

It is significant that this decision (*State of Louisiana v. State of Mississippi*) has been cited approximately 45 times according to Shepard Citations and it

has always been cited with approval. Of course, it was not always cited in support of the Thalweg Doctrine because there were other important points in the case such as the principle of acquiescence and prescription. However, the decisions can be accepted as one of the leading cases on the Thalweg Doctrine. Yet, to repeat, this was a case where free common navigation of the water boundaries between Louisiana and Mississippi was in existence by virtue of the Act of Admission of Louisiana dated April 8, 1812.

An examination and analysis of that case reveals that the Court was thoroughly aware of the contents of the Act of Congress of April 8, 1812 because the first paragraph is quoted.

The Act of Admission of Louisiana (adopted *after* the Louisiana Constitution of January 22, 1812), makes the Mississippi and the navigable rivers and waters leading into it and the Gulf "common highways and forever free" for Louisiana's people and those of other states and territories. So, the Mississippi Territory, adjoining Louisiana on the east, was the beneficiary as was the State of Mississippi when it was admitted into the Union in 1817.

The Treaty of 1819 between Spain and the United States gave the "use of the Waters and the navigation of the Sabine to the Sea" to both nations—the exact same privilege to Spain and its successors on the west as the Act of Admission gave to the Mississippi Territory on the east. The same Constitution of Louisiana of 1812 was involved.

State of Georgia v. State of South Carolina, held, as found by the Special Master, that, under the Beaufort Convention, both Georgia and South Carolina had common rights of navigation in the Savannah River (just as Spain and the United States had in the Sabine under the Treaty of 1819). So the *Thalweg doctrine* was held **INAPPLICABLE**. Louisiana and Mississippi had common rights of navigation in Pearl River, Lake Borgne and the other boundary waters between them under the Louisiana Act of Admission of April 8, 1812; yet, in that case the Supreme Court held that the *Thalweg Doctrine* **WAS** applicable. This would appear to throw the two cases in conflict. To repeat and reiterate: if the fact that the two bordering states or territories had common rights of free navigation in the navigable stream that constituted their boundary—thus obviating the necessity for applying the *Thalweg Doctrine*—in one case (*State of Georgia v. State of South Carolina*) why not in the other (*State of Louisiana v. State of Mississippi*)?

It can be strongly argued that in parent cases like *State of Iowa v. State of Illinois*, 147 U.S. 1, 13 S.Ct. 239, 37 L.Ed. 55 (1892), the Court was merely stating the basic historical *reason* for the *Thalweg Doctrine* and was not laying down as a *legal principle* the idea that there *must* be a *necessity* for protecting navigation on behalf of the two adjoining states for the doctrine to apply.

We have here an anomalous and abnormal situation. Louisiana's constitution simply says "middle of the river" when delineating the western and eastern

boundaries of the State. The word "middle" is not defined. Yet we have it defined as the "geographic" middle on the west by the Special Master (because of the existence of free common navigation) and defined as the "middle of the main navigable channel" (the thalweg) on the east (despite the existence of free common navigation).

Texas had contended that there was no well defined or habitually used main channel of navigation in Sabine Pass, Sabine Lake or Sabine River in 1812 or thereafter and, therefore, this is sufficient reason to deny Louisiana's thalweg claim. Quite to the contrary, Louisiana has, in fact, introduced evidence to show the most navigable channel through the Sabine, with this evidence being dated as early as 1838.¹⁷

House Executive Document No. 147, 47th Congress, 1st Session, is a letter from the Secretary of War transmitting a report of the Chief of Engineers of the result of the survey of the entrance to Sabine Pass, which letter was referred to the Committee on Commerce on March 29, 1882, and which makes several references to the depths in the Sabine and its navigability. See also House Document No. 1290, 61st Congress, 3rd Session.

If the holding in the *State of Georgia v. State of South Carolina* case, *supra*, is followed by this Court then, since Louisiana owns all the islands in the Sabine, it follows that "where there are islands the boundary line between Texas and Louisiana is midway between

¹⁷ See La. Ex. K, Items 2, 3, 6, 7, 8, 9, 10, 11 and 12, and Appendix "A", Item 4.

the island's bank and the [Texas] shore when the water is at ordinary stage." [South Carolina deleted and Texas added].

CONCLUSION

We respectfully urge Louisiana's boundary should be recognized as the west bank of the Sabine as established by the Treaty of 1819 and as surveyed and staked and the title to all islands in the Sabine be recognized as belonging to Louisiana.

Respectfully submitted,

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CERTIFICATE

I, WILLIAM J. GUSTE, JR., Attorney General of Louisiana, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of _____, 1972, I served copies of the foregoing brief by transmitting conformed copies of the same, by first class mail, postage prepaid, to the Special Master, the Office of the Governor and Office of the Attorney General, respectively, of the State of Texas, and upon the Solicitor General of the United States, in compliance with Rule 33.2(b) of the Rules of the Supreme Court of the United States, since the Report of Special Master has raised the question of the constitutionality of an Act of Congress of July 5, 1848 (9 U.S. Stat. 245).

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INDEX TO APPENDIX*

*Description**Item
Number*

1. Article entitled "Reverend Devil" by Ross Phares published in 1941, which is a biography of John A. Murrell, from which is taken a chapter entitled "The Free State of Sabine."
2. Sugar, Leon "Following the Spanish Trail Across the 'Neutral Territory' in Louisiana", Volume 10, La. Hist. Quart. pages 86-93, (Jan.-Oct., 1927).
3. Letter of Walter W. Ristow, Chief, Reference Department, Geography and Map Division, The Library of Congress, Washington, D. C., to Emmett Sole dated November 8, 1972, to which is attached copies of an 1838 map of Louisiana, and the text portion describing the boundaries, from Thomas G. Bradford's *An Illustrated Atlas . . . of the United States* (Boston, Weeks, Jordan and Co., 1838).
4. Letter of Ashbel Smith to A. J. Donelson dated February 10, 1845.
5. House Document No. 365, 25th Congress, 2d Session, being a letter from the Secretary of War transmitting a report respecting the removal of obstructions to the navigation of the Sabine River, which report is dated May 7, 1838, and to which is attached certain plats showing depths in Sabine Pass, and Lake.

* The documents forming this Appendix are not part of the official record in this case but is matter of which this Court may take judicial notice.

APPENDIX

Item No. 1

CHAPTER VI

THE FREE STATE OF SABINE

Back in Tennessee, Murrell found that the old home country was being settled rapidly. It made him nervous to see these changes; opportunities were not so plentiful as they once were.

But Murrell, in his travels, had found a strange new country where "speculations" were plentiful and law was unknown. At first the place had offered him no great inspiration. He merely dashed into it for excitement and adventure, and after filling his pockets passed on. Now, the sight of rapid developments in his home state gave him the urge to move on. He felt cramped and hemmed in here. He began to think of better and more isolated headquarters. His thoughts turned to the Free State of Sabine.

The Free State of Sabine was a freak nation that lay along the eastern side of the Sabine River on the western border of Spanish territory. It was a bastard state that owed no nation homage, and held the respect of none. It was ruled entirely by outlaws, and there was no law except the law of might. Because of its strategic [*sic*] location, it was one of the most talked of places on the continent, as well as the most feared. Practically all traffic in and out of the Southwest had to pass through this country. And because of the immensity of this traffic and the richness

of the cargoes, the outlaw realm became powerful and wealthy, and consequently audacious.

This country was not large, not more than fifty miles wide, with indefinite boundaries on the north and southeast, and no military fortification. A small army could have wiped it off the map. But in spite of the fact that it threatened the very existence of traffic between two important nations and held progress at a standstill along its frontiers, no nation molested it; and its barbarous practices continued until the very name of the place became a word of horror.

Only a strange history in a strange land could have given birth to such a geographical freak. And only a feverish, deep-seated international jealousy would have permitted the existence of such a state.

The history behind the Free State of Sabine dates back almost to Columbus' discovery of America. For it was not long after this event that the French and Spanish came into conflict over land in the western hemisphere.

In the year 1685 an unusual flare of jealousy broke out among the Spaniards. In that year LaSalle, through mistake, missed the mouth of the Mississippi River and landed on the southern coast of Texas. The Spaniards could not accept this extended westward cruise as an accident. They immediately renewed their efforts to colonize Texas. And the French took advantage of LaSalle's bad navigation and laid claim to the Texas territory. But neither nation made any

headway colonizing the territory. Texas was too far from their bases of supplies.

After an official flurry and a lot of talk about "what they would do," the Spaniards relaxed. LaSalle had been murdered; and his followers had starved to death or disappeared otherwise. They forgot about Texas.

Then in 1714 they flew into another fit of jealousy. For in that year a young French merchant by the name of Louis Juchereau de St. Denis appeared at the presidio of San Juan Bautista on the Rio Grande with a cargo of merchandise to peddle. Such audacity was unheard of! Spanish officials went into a hysterical trance over the affair. This brazen, intrusive Frenchman might find their mines; he might call himself an explorer; he might start France to talking about that old LaSalle claim. He was detained at the presidio until the officers became rational enough to decide what to do with him. Then his goods were confiscated and he was rushed off to prison in Mexico City.

And there one of the queerest turns of history took place. St. Denis won the confidence of the officials, headed an expedition of Spaniards organized to settle the eastern frontier, and on the way back, at San Juan Bautista, recovered his goods and as an added flourish, picked up the beautiful granddaughter of the commandant for his wife.

St. Denis led the Spaniards to within fifteen miles of Natchitoches, the French outpost. Here they

established the town of Los Adaes, which in time became the capital of the Texas province. It was a puzzling act, this Frenchman leading foreigners into territory claimed by his own country. But Louisiana at that time was a commercial colony, and St. Denis' orders were to establish trade. It was much easier to trade with Spaniards if they were close to the French storehouses. Commercially and socially the arrangement was satisfactory enough, but from a diplomatic standpoint there was no end to the trouble it brought.

Boundary disputes raged for years. In desperation, and then in boldness Spain would claim the whole of both Texas and Louisiana. But France too knew how to play this ancient diplomatic game. When her move came she would retaliate by claiming for herself all of Louisiana and Texas.

When the United States came into possession of Louisiana in 1803, nothing had been done about a western boundary except a lot of writing and swearing. The United States politely took up the boundary argument. But it soon became no more polite than international diplomacy forced it to be. When the diplomats failed, the armies were called in. The United States was not sufficiently patient to wait with the hope that perhaps another hundred years would in some natural way fix a boundary.

Spain let it be known that she was prepared to defend her territorial claim. The United States republic, now flushed with territory by the Louisiana

Purchase, with a characteristic youthful pride, and aggravated by growing pains, gave the impression that it was ready to take on all comers. And so in the fall of 1806, both nations playing a bold part, and not to be outdone by the other, sent their armies marching viciously toward the disputed territory.

The Spanish army drew up at the west bank of the Sabine River. The American troop camped on the other bank. Soldiers on both sides stood in readiness with loaded guns waiting for the command to fire. But the command never came.

The two opposite generals got together and temporarily settled the matter by agreeing that the territory between the Sabine and the Arroyo Hondo should be neutral ground. Their respective governments ratified the treaty. And in this manner both nations saved their faces without going to war.

But little did either nation realize the outcome of such an agreement. A strict provision of the treaty declared that neither nation should send any armed forces into the neutral zone; no police power of any nature was provided for.

It seemed that geography had gone mad. For here, in an already unruly region where two wild frontiers met, was established a sanctuary for all those who hated law and order. No flag waved over this "No Man's Land"; no law was binding. Soon the riff-raff of the earth came pouring in, outcasts of all countries, fugitives from justice, thieves, robbers, desperadoes of all varieties. It was an outlaw

Utopia. For once within the bounds of this neutral zone he was free of pursuit. No law could touch him here; he might laugh at all laws.

It was a desperate, reckless crew that flocked here for protection, and to live upon the commerce that passed through their state. They robbed and pillaged and murdered to their hearts' content, and preyed upon one another as wild beasts that know no law. They made capital of the jealous dispute between Spain and the United States, and dared anyone to molest them. Of great importance to the prosperity of the outlaws was the fact that the two main highways of the Southwest crossed the Neutral Ground.

What the Natchez Trace was to the Mississippi Valley, the San Antonio Trace* was to the Southwest. It was the road that St. Denis had established on his first trip to Mexico; and it immediately had become the most important highway of the Southwest. It ran from Natchitoches westward toward Mexico City directly across the Neutral Ground, a most unfortunate circumstance for travelers and traders.

The other road was Nolan's Trace, a branch of the San Antonio Trace that left the older highway just east of the Sabine and crossed the Red River a short distance above the present city of Alexandria. Nolan's Trace was the shortest route from the western plains to the eastern stock market, and during

* Often referred to as El Camino Real.

the first half of the nineteenth century thousands of head of horses and cattle were driven over this trail.

There was no route around the Neutral Ground, and it pleased the freebooters to think of the fact.

The longer Murrell thought about the Free State of Sabine the more appealing it became to him. There in the Neutral Ground, an outlaw empire might be established. A shrewd man might become king! The thought set his ambition on edge.

So the Reverend Murrell discarded his Bible and long coat. He bought an extra pistol instead. Then he headed toward the Sabine with fantastic dreams blazing in his head.

Between the San Antonio and Nolan's traces he established himself. His headquarters were a natural marvel. No bandit could have picked a better location. His hideaway was a huge cave near the foot of the highest hill in the region. For miles on all sides open forests of virgin pines spread out in a beautiful, though confusing monotony. Occasionally there was a ravine with its stream of clear water, lined in places with small hardwood trees. But for the most part the country was a meaningless expanse of twisting, pine-covered hills. It was a confusing country to the stranger trying to find his way about.

The cave was an exceedingly large one. It served not only as living quarters, but was sufficiently large to house supplies and stable a large number of horses. A clear rippling spring branch rushed by within a few yards of the entrance. It was a beautiful, iso-

lated, melancholy retreat where the wind forever moaned weirdly and mysteriously among the top of the tall pines.

Before long Murrell had a collection of men around him, bold, deadly ruffians who would rob or kill at the command. The cave became a treasure house. For it was the heyday of the traces. Out of the Southwest came packtrains of silver from the Mexican mines, long droves of cattle and horses from the Texas plains, and back toward the west traveled merchants from Natchitoches, New Orleans, and Europe with their packs of silks and jewels. Many adventurers and home-seekers from the East, lured by accounts of rich lands and opportunities in Texas, headed through the Free State with high hopes, and fortune in pocket.

Murrell knew how to handle these travelers. He had outposts along the traces at strategic points—at Natchitoches, at the inns, and at the river crossings. His scouts kept him informed upon all the important business along the traces. These aids were men of various professions, inn-keepers, stock raisers, muleteers, farmers, traders. Many, perhaps most of them, did not know the extent of the workings of the gang they served. They did their small part, received their rewards, asked no questions, and kept their mouths hushed. A few became involved, more or less innocently, with Murrell, and were then afraid to turn back. It seems that for a number of years Murrell was the ruling spirit in the Neutral Ground.

It was along Nolan's Trace that Murrell committed his greatest depredations. It seemed that a curse hung over this road and those who traveled it from the time it was blazed until it faded out of use. Drama, tragedy, and romance marked the old road all the days of its impetuous life.

Philip Nolan, the man who laid out the trail, was a handsome, adventurous, young Irishman, who resided at Natchez on the eastern edge of Spanish territory. His business was dealing in horses. The Spanish army needed horses, and the animals were scarce around Natchez. Nolan saw a business opportunity and made capital of it. For a number of years he rounded up horses from the Texas plains and sold them to the officials of the Spanish dominion. It was over this road that he ran hundreds of galloping wild ponies, and in the doing accumulated a modest fortune.

But the Spaniards became suspicious about the information this American was accumulating concerning the province of Texas. While herding horses in Texas he was shot by the Spaniards, who reported to his bride of a few weeks that he had merely deserted her and his country. And then, to add misery to misfortune, a certain Edward E. Hale wrote a little book which he called *The Man Without a Country*, and through an unfortunate coincident he named his leading man Philip Nolan. And due to the circumstances and erroneous reports (later clarified by a companion of Nolan who after twenty years in Mexican prisons escaped and gave the true story) about

Nolan, many believed that the American trail blazer was the young lieutenant in the Reverend Hale's book.*

Nolan's Trace, like its blazer, was destined through all its days, to a turbulent, eventful existence. Due to its remoteness it was always a dangerous road.

Before Murrell came to the Free State outlaws had from time to time stampeded droves of horses and cattle along the traces and carried them off to markets of their own selection. It had been rather easy in the matted undergrowth and canebreaks along the winding creeks. The outlaws usually knew the country better than did the drivers. And they knew how to hold their advantage. Occasionally the drivers offered resistance, but usually after a few shots they stampeded as easily as the cattle and wild horses. But Murrell had a better plan. He watched the long droves of stock go by on the way to market. Murrell had patience. These men would be back. "Why," he reasoned, "should he trouble himself to drive these stubborn wild beasts for days over wilderness roads and fight the dust and flies at their heels?" Why run any risk of complications at the market place? His prospective victims enjoyed the job too much themselves. It would grieve him much to deprive them of the pleasure! True, they would spend part of their earnings in the towns. But there was always plenty.

* Reverend Hale regretted this misleading circumstance; and to prove that it was all a coincidence and that he meant no injustice to the memory of Philip Nolan, he wrote another book about the real Philip Nolan and titled it Philip Nolan's Friends.

And if the correct time and place was chosen by a specialist, the task of collecting the stock money was a frivolous detail.

Murrell planned his work with the precision of an architect. He arranged his procedure to fit the circumstance; his knack for calculating was remarkable. If an attractive drove of cattle crossed the Sabine River on the way to market, some of his men were usually on hand to investigate the matter. It was a popular procedure for some member of the gang to "accidentally" fall into company with the cow drivers and find out their business—where they expected to sell their stock, what such cattle were expected to bring at the market at that time, when they would be coming back, by what route. It was all very casual; travelers on long journeys have to talk about something. Men who talked too freely usually never lived to warn others.

After the stagecoaches started running across this country, the outlaws attacked many of them and staged bold and merciless holdups. But Murrell never made a practice of this type of robbery. It was too difficult to do away with a stage coach and an entire crew. These coaches ran on a schedule, and the disappearance of one would have been rather conspicuous. Murrell was too shrewd to run such risks. Usually he found that it was not necessary to run risks in the Neutral Ground.

If prosperous looking gentlemen were passing through No Man's Land, scouts, as a rule, spotted

them. There were stops along the trace that the stages had to make. At any of these places some member of the gang might fall into conversation with a rich traveler, suggest a drink of water, or perhaps something stronger. Any scheme to get the traveler out of sight. Once this was accomplished, the rest was easy. He was killed, his possessions taken, and the robber disappeared into the forest before anyone could know that anything unusual had happened. If a traveler appeared to be a good prize, or likely to be hard to handle, a member of the gang might engage transportation over the route to see that plans were not frustrated. In some crowded inn they might be forced to sleep together. Any circumstance that necessitated privacy was arrangement enough.

On one occasion one of Murrell's scouts reported that a "rich prize" was in transit to Texas. He had stayed for awhile at the scout's inn and had made himself very impressive by telling of his wealth. A "companion" was immediately dispatched to accompany him. Shortly after dark the stagecoach drew up at a small inn that the passengers might refresh themselves and new horses might be hitched to the stage. When the impressive traveler entered the inn his "companion" and two other men, who appeared as if from nowhere, followed closely behind him. They unceremoniously rushed him into a side room. The door flew closed. A muffled scream was heard. When someone finally ventured into the room, no one was to be found. The back door was open, and outside all was quiet and apparently peaceful. When the alarm

had been spread and preparation for pursuit made, it was discovered that all the horses in the corral had been turned out, and not even the stage horses could be found. The next morning the supposedly rich man's body was found in the well back of the house.

The San Antonio Trace was much older, better known, and traveled more than Nolan's Trace. There were a few villages on it, and alongside it, or near, were farmhouses. It was for over a century the most important highway west of the Mississippi.

During the heyday of the Free State of Sabine the population along the trace reached the lowest ebb in many years. Several years before the signing of the neutral zone treaty the Spanish had abandoned their capital [*sic*] at Los Adaes. And when war had seemed likely between the United States and Spain, most of the remaining Spaniards immigrated further into Texas or Mexico. After the outlaws took charge, only a small part of the old population remained—a few stubborn Spaniards, unconcerned half breeds, half-wild French traders, and a sprinkling of Anglo-Saxons who had established homes and dared to stay there and live in spite of the fact that no government existed. Before long citizens and travelling merchants were pleading for police protection. They had been left to a cruel fate.

When conditions had become almost intolerable, the United States government took it upon itself to clean up this nest of outlaws and thugs. But the United States was quickly warned by Spain that it

was strictly against the provisions of the treaty of 1806 for any armed Americans to enter this territory, and that any such act would be construed as a hostile move toward Spain and an attempt to invade Spanish territory. The Americans had made a reputation for pushing over frontiers. And Spaniards were not inclined to take any unnecessary chances with the aggressive Americans. They were determined that they should come no closer to Spanish territory than the eastern boundary of the neutral zone. And so conditions became steadily worse in the Neutral Ground. It was perhaps the most dangerous strip of territory on the continent. Helpless people there continued to be robbed and murdered, and worse still, these marauders became so bold they made raids upon surrounding territory and then dashed back into their reserve. If the bandit could escape over the boundary of the Free State, he was safe from all punishment.

Further alarmed by this growing menace, the United States government proposed a joint campaign against the outlaws. But Spain did not choose to accept the offer. Apparently she was jealous of all moves the Americans might make, and she felt that this outlaw empire might serve as a buffer state against future aggressions.

In 1819 Spain recognized the Sabine River as her eastern boundary. And the Neutral Ground might technically have come to an end at that time. But for two years Spain refused to ratify the treaty in an effort to induce the United States not to recognize

her rebellious colonies. However, in 1821 Mexico won her independence from Spain, and the United States then had Mexico to deal with instead of Spain. Again it seemed that the old problem would be settled and the terrible Neutral Ground brought to an end, but the new Mexican republic, ambitious as a result of her accomplishments, refused to recognize the treaty made by the mother country.

The marauders continued their depredations while diplomats at the capital cities politely argued over the boundary question, and discussed lengthy plans, which resulted in nothing.

After 1821 the United States ventured to strengthen her claim to the Sabine River by sending Zachary Taylor into the disputed territory with orders to establish a fort and look after the interests of the United States there. In 1822 Taylor established [*sic*] Fort Jesup on the San Antonio Trace on the watershed between the Red and Sabine rivers, about twenty miles from the latter. The chief duties of the troops were to guard the border, and to impress Mexico with the strength of the United States. And though the country was not officially recognized as American soil, the presence of the army gave a rather definite impression that it was only a matter of time until the Free State of Sabine would become a part of the American commonwealth.*

Murrell did not care to become involved with

* This boundary problem was not officially settled until 1836 when Texas became an Anglo-Saxon republic.

soldiers. And for that reason he confined most of his plundering to the trace to the south. But there was one place along the San Antonio Trace that was too tempting for any adventurer of Murrell's caliber to miss. That was Shawneetown, located on the trace three miles west of Fort Jesup.

The United States government in the very early days of Fort Jesup passed a law preventing whiskey being sold within three miles of the flag post of the cantonment. Shawneetown sprang up at the three-mile limit. Anything the government prohibited at Fort Jesup, Shawneetown took pride in furnishing. Liquor, women, gambling, entertainment of all shades. There was open house all time.

Shawneetown was one place along the San Antonio Trace that was equipped to entertain the toughest traveler. It was the most wicked resort along the entire trace; the village boasted of the fact, and travelers advertised it well. It was a place where the mightiest made the rules and the weaker obeyed. It was the place where East and West met. To the Anglo-Saxon on his way west it was the jumping-off place; to the Latin on his way to the United States it was his introduction to the so-called civilization of the East. Many men spent their last night on earth there. Fortunes changed hands rapidly. It went on from day to day. Men shuffled dirty, limp cards over rough table tops and lost their fortunes in the doing, and then rode off over the same road that brought them, more desperate than ever.

The code of the frontier ruled. It was not a very definite thing, but strange acts were done in the name of it. Gunfire turned over-ambitious gamblers into unidentified corpses. The sound of cracking pistols, a shuffle of chairs, the pounding of galloping hoofs, another mess for the proprietor to clean up. No one seemed to bother greatly. New adventurers came, had their sprees, and yesterdays were forgotten or became heroic stories for stimulated minds to relate. It was a place where men got by on their toughness.

The place was about as far west as white women without family protection went. When the soldiers came, they flocked nearby. Men bargained for them, fought over them, cursed them and left them to their trade. No decent woman ventured near Shawneetown.

Many languages were spoken here, French, Spanish, English and half a dozen other European tongues; and then there was always the Shawnee Indians with their barbaric babble; they acted as servants, and watched the strange, mysterious drama that took place, and drew their own opinions about the pale-face civilization. It was a motley crew that visited Shawneetown: teamsters along the trace, soldiers from the fort, horse traders, horse rustlers, merchants, land prospectors, professional gamblers, outlaws, vagabonds, travelers extraordinary, adventurers in general. It was a place where the high and the low gathered, and dignity and vulgarity met with joined hands.

Shawneetown was too attractive a temptation for

any young blade with an adventurous nature to miss. Here Murrell met kindred spirits. He enjoyed the society there, and spent his easy money with the entertainers; but he always had his eyes and ears open. Here was an excellent place to gossip. Travelers brought tidings from all parts. If citizens or officials were getting suspicious it would surely be talked at this place sooner or later. Murrell was a scientist in his own way. He had a mission; and he seems never to have lost sight of it. He had his frolics and his sprees, and at times he let his passion for counting other people's money get the best of his better judgment, but the man was never fickle in his purpose. From the resorts at Shawneetown the outlaw and his confederates could watch the traffic go by and calculate upon its possibilities. But to the people in the little frontier village Murrell was just another sucker, spending money recklessly. He was too shrewd to attempt any crimes near the fort. Nobody suspected Murrell because of his money. He had the bearing of a man of wealth. No one questioned these things at Shawneetown anyway.

"Business" around Fort Jesup was left to an associate gang. Not a great deal was known about the associate gangs of Murrell, or just what kind of an outlaw confederacy existed in No Man's Land, but there were several minor gangs over which Murrell exercised some control. What the system of organization was, just what allegiance the lesser chiefs held for the outlaw king, has never been determined. But

in their own mysterious way they had their codes and rules.

Perhaps the boldest of Murrell's lieutenants in the Free State was Hiram Midkiff, the leader of a band of horse thieves. The Free State had been ideal for the horse rustler. Horse stealing had been one of the most thriving businesses of the district. Horses were stolen in Texas and run into the Neutral Ground, from which place they might be taken with ease to any more eastern market that might suit the convenience of the thieves. It often happened that horses were stolen in Texas, sold in the Neutral Ground, re-stolen and carried back to Texas for re-sale. It was a racket that the professional horse stealers perfected to a system.

Hiram Midkiff lived a double life. In many ways he resembled Murrell. Midkiff posed as a horse trader. On the commissary porch at Fort Jesup he whittled sticks, chewed tobacco, and swapped yarns with the officers of the fort and citizens of the community, and carried on as a regular fellow. His extensive riding about the country became noticeable, but no one could pin anything definite on him. Such were the habits of the old time horse trader.

But for a long time he was under suspicion, and citizens in their frontier way referred to him as a dangerous man. But no one ventured to make an accusation; it was considered best to be polite to him. And through fear the horse rustler commanded a great deal of respect.

Midkiff played a bold part, and his success seems to have given him too much confidence. The beginning of the end came in a rather blunt manner. One day a slave belonging to Henry Stoker, a pioneer of the Fort Jesup community, came to his master and remarked in a distressed manner that Midkiff "said for me to bring him the horse, but I'm not going to do it." It was so sudden that Stoker was puzzled for a moment. But upon a minute's reflection he sensed the plot. He questioned the negro and found that the horse thief had planned for the negro to bring his master's best horse to him in the woods.

Stoker ordered the negro to lead the horse to the spot that Midkiff had designated. It was learned that the negro was to whistle as a signal to Midkiff. Stoker ordered his negro to carry out the instructions exactly as Midkiff had given them to him, but instructed him to get out of the way just as soon as he handed him the reins.

Early that night Stoker went to the spot where his horse was to be delivered and hid nearby behind a log. He had with him two sons and two neighbor boys, whom he also stationed nearby.

Later in the night the slave came with the horse and whistled his signal at the designated spot. Midkiff appeared immediately, his rifle across his arm, cocked. Stoker shouted at him to halt. No sooner said than Midkiff's rifle cracked. Stoker, already in a squatting position, fell over backwards, just as the bullet whizzed over his head. Stoker then aimed quick-

ly and fired. The bullet took effect in Midkiff's right breast.

Stoker and his boys set out for Fort Jesup with Midkiff, who struggled desperately every step of the way to escape. They noticed him making strained movements with his right arm. And if Stoker's bullet had not handicapped the arm, serious consequences might have resulted in the dark. For on his left shoulder was found a scabbard containing a long knife. When he had attempted to reach the knife with his left hand, the movement was so awkward that the weapon was discovered before he got his hand on it.

Midkiff was sullen. Long into the following day the citizens worked with the horse thief, questioning him. But he refused to talk.

Finally General Twiggs, an officer stationed at Fort Jesup, brought the questioning to a close. He threw a rope around Midkiff's neck and said: "We'll make him talk."

The weakening thief insisted that if they would promise to give him his freedom he would tell everything, and assured them that they would never be bothered with him again. He explained that after talking he would be forced to leave the country or his own men would kill him. Whether the men at Fort Jesup, seeing that he was dying, made the promise, or whether he volunteered, or in his delirium told, enough was learned for a posse to find his camp.

On a small creek, near the present town of Fisher, Louisiana, the posse located his camp that night. Mid-

kiff had excellent headquarters for an outlaw. To the east were the great open forests of virgin pines; and to the west, extending to the Sabine River, were ridges of beech and oak with their thick undergrowth. It was an unsettled, broken country of hills and winding creeks and bottoms. And nearer the Sabine River was a wilderness of swamps and canebreaks, a refuge for any fleeing bandit.

Shortly after dark the posse surrounded his camp. All night they waited silently in the undergrowth near the house. Early next morning one of the men, known as Tiger Bill, came out of the house to get firewood. He saw the men, wheeled and dashed madly toward the house. But a bullet dropped him before he reached the door. The bullet took effect at the point where his suspenders crossed. His back was broken. He fell to the ground face down, wiggling like a snake, yet struggling to make it to the house. And it was Midkiff's own rifle that had fired.

Four or five other men were captured. When the posse returned to Fort Jesup Midkiff was dead. Whether the capture included all of the Midkiff band or not was not known. But it definitely broke up horse stealing around the fort.

Murrell personally did not dabble much with horse stealing in the Free State. He was beginning to design bigger things.

Ideal as the location was for the outlaw, it was not sufficient to hold Murrell for a great length of time. He had enough foresight to realize that sooner

or later international difficulties would be cleared, and the outlaw empire would be rubbed out. Though an excellent place for the freebooter, it was, after all, a rather small place. Murrell was always scouting for something better, something bigger.

In the Free State of Sabine Murrell heard much talk of the marvelous opportunities of the Spanish Territory to the west, a land described as rich, and sure to become the most prosperous part of the continent. It was still unsettled and only partly civilized, but no one could calculate the great wealth that lay hidden there. Fabulous fortunes would be amassed there as if by magic!

Now that soldiers had marched into his Happy Hunting Ground, and his men were being shot down, he decided to look about for better territory. So he crossed the Sabine and set out for the Spanish Territory to see what there was to those fantastic tales he had been hearing.

Item No. 2

**FOLLOWING THE SPANISH TRAIL ACROSS
THE "NEUTRAL TERRITORY" IN LOUISIANA**

By LEON SUGAR of Lake Charles, La.

The route across the American continent trod by the Citizenry of Spain wound and wended and twisted in irregular lines and turned at rambling angles, but from sun to sun unfailingly it went. The route is now overgrown with weeds and briars, with farms and villages, with cities and with sovereign states, but, for all that, we can follow it by the foot prints still trailing on—here some sojourner tarried for a rest, then tarried longer, and then founded a home; there a stream, a hill, a valley, to which still cling the romantic names that befell them; and thus, link by link, we follow from ocean to ocean.

The imprint of Spanish occupancy is not deeply marked in the Calcasieu locality. In other parts of Louisiana and other localities, to the north, to the east, and to the west, reminders are numerous and prominent. "The Calcasieu country" wrote Judge Xavier Martin, in 1827, "is a barren waste." The Spaniards seemed to have no greater appreciation; they claimed sovereignty and they passed back and forth across it, possibly because it was convenient, but otherwise they paid it small attention.

The western boundary of the Province of Louisiana and of the State of Louisiana was for a long time involved in much obscurity. When France ceded Louisiana to Spain (1762) and when Spain restored

Louisiana to France (1803) and when France sold Louisiana to the United States little was known or cared about the geography of the country they were peddling. The ignorance of the participating high dignitaries was glossed over with language, sonorous, but loose and far from, even approximate, precision. This ignorance, or carelessness was the cause of great trouble and led to many bloody battles.

A strip of country on the western edge of Louisiana, long in dispute between the United States and Spain, was known as the "neutral territory." As a matter of fact it was far from neutral. There were many contentions between settlers of different allegiance. This, however, more particularly applies to the country further north. The land records for this vicinity show very few names that bespeak Spanish nativity. The records make mention of settlers who were here in early days but names like Thompson, Smith, Perkins, King, Ryan, etc., are not suggestive of Spanish ancestry.¹

After the treaty of 1819 between the United States and Spain, the United States recognized and respected the land grants made by Spain, but did so only after the claimant produced absolute proof. With few exceptions, the early cessions of Calcasieu lands made by the United States were to actual settlers.

The act of congress of March 3, 1823, provided "that all that tract of country situated between the Rio Hondo and Sabine river, within the

¹ American State Papers, Vol. IV, p. 146.

State of Louisiana, and previously to the treaty of the 22nd of February, 1819, between the United States and Spain, called the neutral territory, be and the same is hereby attached to the district south of Red river; and the register and receiver of the land office in said district are required to receive and record all written evidences of claim to land in said tract of country, derived from, and issued by, the Spanish Government of Texas, prior to the 20th day of December, 1803, according to the regulations, as to the granting of lands, the laws and ordinances of said government, and to receive and record all evidences of claim, founded on occupation and habitation, and cultivation."

An attempt to ascertain, or define, the boundaries of the so-called neutral territory is found in the testimony taken before the register and receiver of the Natchitoches land office in 1824.²

Testimony of Samuel Davenport. "The neutral territory comprehends all the tract country lying east of the Sabine and west of the River Culeashue, Bayou Kisachey, the branch of Red river, called Old River, from the Kisachey up to the mouth of Bayou Don Manuel, southwest of Bayou Don Manuel, Lake Terre Noir and Aroyo Hondo, and south of Red river, to the northwestern boundary of the State of Louisiana."³

Testimony of Jose M. Mora. "I have no other knowledge of the neutral territory, as to its boundaries, but from the Rio Hondo to the Sabine river."

Testimony of Gregorio Mora. "In the years 1794

² *Ibid.* 89.

³ *Ibid.* 90.

and 1795 I collected the tithes of all the residents who lived or who had stocks west of the River Culeashue, of the Bayou Kisachey, of the Bayou Don Manuel and Rio Hondo, and south of Red river, which were at that time within the jurisdiction of Nacogdoches and on the line of the Providence of Louisiana."

Orthography and geography do not seem to have given any worry to our pioneers. When not opposed by superior force they went as they wished; and when they spelled a word they went according to the law of least resistance. When one of them trimmed his quill pen self-respecting letters that objected to orthographic mesalliance had to find safety in rapid flight.

A number of parties appeared and submitted written documents in support of their land claims. These documents are quaint and interesting, but only a glimpse at them can be given here. It appears that the land grants under Spanish authority needed to be followed up by placing the grantee in actual physical possession.

The following copy of a "process verbal of possession" is almost (except for change in names and description of land) word for word, like all. And, like all, it shows a lack of fixity in boundaries, but characteristically, verbosity is sought to make up for lack of precision.*

"On this 29th day of December, 1795, in compliance with the foregoing decree, I, Jose Cayetano de Zepeda, *sindico procurador del comun Pueblo de*

* *Ibid.* 111.

Nuestra Senora del Pibar de Nacogdoches, went with the witnesses of my assistance, Don Jose de la Vega and Vincento del Rio, to the place called Bayou of the Adaise, where the petitioner claims, and has built his house, in order to give to the said D. Pedro Dolet, who is now living on the premises, possession according to the decree; wherefore, being at the designated place on the Bayou of the Adaise, and having inquired whether any of the neighbors would be injured by this grant, and having well ascertained that there was no impediment whatever, and that none of the boundaries of the adjacent proprietors intersected or touched those designated by Pedro Dolet in his foregoing petition, for which reason no injury can result to the nearest neighbors by giving Pedro Dolet possession of the land he claims in his petition, with all the extent and the boundaries therein mentioned; I have visited those boundaries, and the land they surround, with the aforesaid witnesses of my assistance, and the said Pedro Dolet, and, taking the latter by the right hand, I went with him a certain number of paces from north to south, and afterwards from east to west; and then, having let his hand go, he went as he pleased on the said land of Bayou of the Adaise, pulled up grass, made holes in the ground, planted stakes, cut bushes, threw dust into the air and on the ground, and performed several other things and capers, as evidence of the possession which I had given him in the name of his Majesty, whom God preserve, of the said land, with the extent and boundaries which he has demanded, and in proof of the property which he now holds in it as sole master by virtue of this act of possession, and, also, as a

symbol of the right of property which he forever holds on said land, of one league on each course of the compass, in the manner, place, and with the boundaries expressed in his foregoing petition, with all uses and privileges thereunto belonging; and, afterwards, I have designated the aforesaid tract of land by the name of San Pedro de las Adaise, so that it may forever go by that name; and, in order that said Pedro Dolet may be forever quieted in the peaceable enjoyment of his said land agreeably to law, and, that the evidence of his right may appear, I have signed these presents, with the witnesses of my assistance, at San Pedro de las Adaise, the day, month, and year aforesaid.

“JOSE CAYETANO DE ZEPEDA

“Jose Luis de la Vega

“Vincente Del Rio.”

It is left for the reader to imagine what other possible capers were left not performed.

The treaty of 1819^s and the congressional act of 1823 locate the Aroyo Hondo as in Louisiana and east of Sabine River. Quite likely the reader in Imperial Calcasieu would have as much difficulty in finding the Rio Hondo as in finding the Culeashue. On some of the older maps our lovely Calcasieu river is many times noted as Bayou Quelqueshue and sometimes as Calcasheu—never Quelquechose, as some think was the original name. This country was roamed over and at times occupied by Indians and not always by the same tribe, and there is authority, apparently well founded,

^s Treaty with Spain, Feb. 22, 1819.

for the statement that "Calcasieu" is derived from a certain Indian word meaning "Eagle."

As late as 1831 in an act concerning elections to be held in the Parish of St. Landry, it is recited "That hereafter the votes to be received in the additional precinct election, shall be taken at the house of Rees Perkins on the River Calcasieu, in lieu of Stephen Henderson's." * Some comparatively short time after the year 1800 there was a settler on Calcasieu river named John Henderson. His home was some eight or ten miles further up the river than the settlement of Rees Perkins.

The name of Rees Perkins, as a land claimant, appears more than one time in the reports. The house referred to in the act of 1831 was probably on the "Tract of land lying within the late neutral territory, situated on the right bank of the west branch of the Queleshue river, at a pine bluff about three miles from the mouth of said branch * * *" ⁷ ⁸ There are lines on the old maps that, to the mind of the writer, indicate that there was a ferry across Calcasieu river at a point near what is even unto this day known as Perkins' ferry; and that the Old Spanish Trail, from east to west and from west to east passed over Calcasieu river. It is quite probable that the existence of a ferry across Calcasieu river and the existence of a road easily followed led to the change of voting precinct.

In 1824 ⁹ the state of Louisiana granted to Hy-

* Act (La.) No. 3 of 1831.

⁷ U. S. Township plat—Survey approved Mar. 3, 1832.

⁸ Rio Hondo Claim No. 263.

⁹ Act (La.) of Feb. 28, 1824.

polite Guidry the exclusive privilege of establishing and keeping a ferry over the River Mermentau (this name was sometimes in those days spelled Mermenton) at the place where the said river intersects with the Nez Pique. This act was amended in 1826¹⁰ and this time the name was spelled Mementao. Ignorance of, or indifference towards the Calcasieu country is noticeable.

Calcasieu parish, formerly a part of St. Landry parish, was created in 1840.¹¹ Its eastern boundary is given as the River Mermentou. In the following year the privilege of keeping a ferry about two miles below the mouth of the Nez Pique was granted to James Andrew, Sr., and he was required "to keep and maintain in perfectly good order a ferry-boat or flat sufficient at all proper times to transport and ferry across the said River Mermentau all such wagons, horses, cattle, persons and property as may present themselves to be ferried across said river, and such ferry-boat or flat shall at all times be provided with a good railing on each side thereof, lengthwise at least four feet high." In a paper like this it is not quite proper to discuss the possible consequences of a wagon, either horse-drawn or cattle-drawn, presenting itself for transportation across the river.

A considerable number of people were established along the Mermentau river; very few west of there; and this may account for the seeming neglect of the state of affairs in what had been the "neutral terri-

¹⁰ Act (La.) of Feb. 3, 1826.

¹¹ Act (La.) 172 of 1840.

tory." Certainly no great wealth existed about here, for in the year 1841, Act 96 (La.) of 1841, it was provided that there should be two assessors in the Parish of Calcasieu, each of whom was to receive the salary of \$160 a year—one-half to be paid by the State and one-half to be paid by the parish.

Large oaks from little acorns (sometimes) grow. The reader will find on the map of Louisiana, up near the city of Natchitoches, a small black line noted as "Rio Hondo." In the testimony taken at Natchitoches in 1824¹² there are a number of references to the Rio Hondo. One of the witnesses places it about six miles west of the town of Natchitoches; another witness testifies that the land of a certain claimant lies "Within the late neutral territory, situated about a quarter of a mile from the Aroyo Hondo, on the road leading from the town of Natchitoches to Gaines' Ferry on the Sabine river, bounded on the west by the Aroya Hondo * * * *"

The most interesting testimony pertains to the land claim of "Edward Murphy." The testimony submitted by Edward Murphy, was in writing and as follows:

"Sen. Lieutenant Governor: Edward Murphy, of the post of Natchitoches, part of the province of Louisiana, presents himself before you, and says, that on the margin of a creek named Aroya Hondo, which separates the two provinces on the side of the province of Texas and on the margin between the royal road and another which passes by the Bayou St. John, there is a cove which

¹² Am. St. Papers, Vol. IV, p. 89.

I find so advantageous for collecting my cattle, I beg your honor would please to grant me possession of those lands, from which I shall reap great advantage having no place to collect my cattle; and, moreover, to grant me on this paper, there being none stamped: humbly ask of your honor that it may please you to give me possession of said land.

"Nacogdoches, October 17, 1791.

"MORFIT."

"Nocogdoches, [*sic*] October 17, 1791.

"In consequence of the petition, and that the land solicited is in the province of Texas, and vacant, I do grant it in due and best form, and that it may so appear, I sign this at Nacogdoches, October 18, 1791.

"ANTONIO GIL Y BARVO."

There are further numerous references to roads, to ferries, and to Spanish villages, in the country about Natchitoches, but no mention is found of Spanish villages in the Calcasieu territory, nor is there found any mention of highways and roads except the "Old Spanish Trace."

One, George Fogleman, "filed his notice claiming, by virtue of settlement and occupancy prior to February 22, 1819¹⁸ a tract of land, lying within the late neutral territory, situated on the west side of the Quelqueshue river on the Spanish Trace, about two miles above Charles' lake."

James Answorth, Ja., "filed his notice claiming by virtue of settlement and occupancy, a tract of land

¹⁸ American State Papers, Vol. IV, 138.

lying within the late neutral territory, situated on the west side of the Quelqueshue river, and on the west side of Show Pique Bayou, about 15 miles above the entrance of said bayou into the Quelqueshue river, at the crossing of said bayou which is about two miles south of the Spanish Trace."

Henry Moss "filed his notice claiming, by virtue of inhabitation, occupation and cultivation, a tract of land lying within the late neutral territory, and situated west of the Bayou Quelquesheu, on the waters of the Bayou d'Inde¹⁴ about two miles below and south of the Old Spanish Trace to the Sabine."

James Barnett "filed his notice claiming, by virtue of occupation, inhabitation and cultivation, a tract of land situated on the River Sabine at the Old Spanish Crossing, having a cabin on each side of the road."

There is further testimony to the effect that George Orr and Abel Terrall settled on this tract of land in the year 1818, and that it was "under good fence."

Thus ends the Calcasieu section of the "Old Spanish Trace." If the reader would follow along further he must cross the Sabine and find his guide in the land that once was known as the Spanish Province of Texas.

¹⁴ A common error: Should be Bayou Dinde—Turkey Bayou, 112 La. Rep. 218.

Item No. 3

THE LIBRARY OF CONGRESS
WASHINGTON, D.C. 20540

REFERENCE DEPARTMENT
GEOGRAPHY AND MAP DIVISION

November 8, 1972

Dear Mr. Sole:

In response to your telephone request of November 7, enclosed are complimentary xerox copies of the 1838 map of Louisiana, and the text portion describing the boundaries, from Thomas G. Bradford's *An Illustrated Atlas . . . of the United States* (Boston, Weeks, Jordan and Co., 1838).

Sincerely,

WALTER W. RISTOW
Chief

Enclosures

Mr. Emmitt Sole
P.O. Box 2900
Lake Charles, Louisiana 70601

EXTENT. BOUNDARIES. The State of Louisiana comprises that part of the old Territory of Louisiana which lies south of 33° N. Lat., and the section of the Province of West Florida west of the Pearl River, and south of 31° N. Lat. The western bank of the Sabine from its mouth to the 32d parallel, and a straight line drawn thence due north to the 33d parallel of latitude, form its western boundary, the latter parallel is its northern limit to the Mississippi; that river is its eastern boundary to 31° , and Pearl River from thence to its mouth. The strip north of the Iberville and the lakes, and between the Mississippi and the Pearl River, was added to the State soon after it was admitted into the Union. Within the limits thus described, Louisiana, extending from 29° to 33° N. Lat., and from $88^{\circ} 40'$ to $94^{\circ} 25'$ W. Lon., with a broad front of about 300 miles toward the sea, and a length of 260 miles from north to south, has an area of about 48,500 square miles; in the central part its breadth suddenly contracts to about 100 miles, but expands again in the north to 180 miles.

Item No. 4

SMITH TO DONELSON

DEPARTMENT OF STATE

*Washington on the Brazos.**February 10, 1845*

The Undersigned, Secretary of State of the Republic of Texas, has the honor to acknowledged [*sic*] the receipt of the note of the Hon. A. J. Donelson Chargé d' Affaires of the United States of America, bearing date the 2d Decr. 1844. together with the accompanying documents, in relation to a complaint made against the Collector of the Customs at Sabine in Texas, inasmuch as this officer required the payment of tonnage duties from certain American vessels resorting to the port of Sabine for commerce.* The right of every nation to make those interior regulations respecting commerce and navigation which it shall find most convenient to itself and to reserve to itself the liberty of admitting at its pleasure other nations to a participation of the advantages of its commerce, is a doctrine which has received the solemn and repeated sanction of the American Government, and will not, it is presumed, be controverted by the Hon. Mr. Donelson. On this clear principle the Government of Texas may of right establish the conditions on which they will ad-

* Opposite the beginning of this sentence in the margin are written the words, "Treaty between France and the United States of 1778, preamble."

mit other nations to come to their shores and receive the products of their soil or carry on commerce with their inhabitants; and they may require as one of the conditions of vessels trading with their port of Sabine the payment of dues or tonnage duties.

The town of Sabine in Texas is a commercial *port*; the adjacent country along Sabine Bay is washed by navigable waters; and the whole is subject to all the uses and incidents appertaining to a coast bordered by navigable waters. The port in question cannot be used except as a *port*, a *maritime depot*, for ordinary commercial purposes, neither can it by any fiction be regarded in any other light. If Sabine be not used as a *port* it cannot be used for commercial purposes at all; and the Gov't of Texas, as already intimated, may require as one of the conditions on which they will allow foreign vessels to trade with this port, the payment of tonnage duties; and if the payment of these duties be refused may bring to all vessels so refusing and compel payment. Relatively to this point, the undersigned begs to cite Mr. Jefferson who in 1792, then Secretary of State under General Washington declared in a communication on a matter similar to the one now under discussion that, "the right to use a thing comprehends a right to the means necessary to its use and without which it would be useless." And this doctrine has been since explicitly asserted by all the American text writers on International Law and solemnly affirmed and acted on by the American Government. If moreover the use of such means be refused on a plea of "jurisdiction" or the use so shackled by unnecessary regula-

tions as to render it unavailable by Texas, it then becomes an injury of which Texas may demand redress.

If the Government of Texas do not possess the right to collect tonnage dues and establish the other customary regulations of commerce for the port of Sabine, then have we at Sabine the most absolutely free port in the world, and there exists no authority anywhere to regulate or supervise the commerce that may be carried on thereafter. The undersigned does not suppose that the Hon. Mr. Donelson on the plea of "jurisdiction" would claim for his Government the right to establish a custodial use at the Sabine to regulate the commerce of the port, thus making the soil of Texas appurtenant to the water which washes its shores. The authority to regulate the commerce of the port in question must exist somewhere. The undersigned believes it is vested in the Nation owning the *terra firma*. Custom Houses are established on *land* and not on the *water* although their operation extends over the water.

If the right contended for by Texas exist at all, it is and must of necessity be exercised as a *perfect* right, otherwise it would be utterly nugatory. It would be idle to establish regulations for the commerce carried on upon its coast, if vessels in sight and even within short gun shot of the shore may openly set at naught or evade those regulations. And a limited jurisdiction for this purpose must be exercised by Texas over the adjacent waters.

So bold an evasion and flagrant a violation of the

revenue laws of Texas as has been attempted by the averment that the commerce between the shore and foreign bottoms has been carried on by means of flat boats or keel boats, will not surely be justified by the Hon Mr. Donelson. To prevent like audacious frauds, England and the United States claim and exercise for this special purpose a jurisdiction of twelve miles from their coasts respectively, within which distance they will not allow such fraudulent trans-shipments to be made.

By the terms of the Treaty of 1819, made between Spain and the United States, renewed in 1828, between Mexico and the U. States and finally established in 1838 between Texas and the United States, as the basis for running the boundary line, without any change of language so far as relates to the boundary and the waters of Sabine Bay; it is declared that the "use of the waters and the navigation" of the Bay are common to the inhabitants of both countries. This stipulation is declaratory of the right of Texas to the use of the waters in question, and is as clear and essential a portion of the Treaty as that which establishes the boundary line along the Western bank of these waters.

The undersigned has entered into a brief argument above to show on sound principles of public law and from the necessity of the case, that a *barren* use was not intended—a bare permission to sail in and out of Sabine Pass—but a beneficial use for all things which may be lawfully done on shore. If foreign vessels

resort to the port of Sabine to receive the products of Texas, the Nation owning the land and this nation alone, can impose tonnage duties and if necessary can go upon the water to enforce the collection of them by virtue of their right of use solemnly recognised in the Treaty in question. It would be violative of the best established of all rules of interpretation so to interpret the "*jurisdiction*" as to exclude the *use*; both rights repose on the same basis and are not incompatible; effect must therefore be given to both. No incompatibility or conflict can arise, inasmuch as the United States cannot claim to establish custom houses at the port of Sabine nor collect duties upon Texian [*sic*] soil on the products shipped or foreign merchandize imported there; To do these acts appertains of right exclusively to Texas on principles of public law and by the provision of the Treaty of Boundary.

The Undersigned cannot therefore admit the opinion expressed by the Hon. Mr. Donelson that "the authority to collect these duties cannot be recognized by the United States without a surrender of their jurisdiction of the waters of Sabine pass, Lake and river"; on the contrary he conceives that the Government of Texas have a perfect right to collect these duties and to the "use and navigation" of the waters in question for this purpose, and their collection does not conflict with the just claims of the United States nor afford that Government any good cause of complaint. He cannot believe that the Government of the United States propose so to stretch the interpretation to be given to their "*jurisdiction*" as to sustain their citizens in

violating those laws which the people of Texas may legitimately establish, as a condition of commerce with them.

The undersigned embraces this opportunity to present to the Hon. Mr. Donelson assurances of the high consideration with which he has the honor to be.

Most Respectfully

His Very Obedient Servant

(signed)

ASHBEL SMITH

Hon. A. J. DONELSON

*Chargé d'Affaires of the United States of America
etc. etc. etc.*

Item No. 5

25TH CONGRESS
2d Session.

[House Doc. No. 365.]

HO. OF REPS.
War Dept

OBSTRUCTIONS IN SABINE RIVER.

LETTER
FROM
THE SECRETARY OF WAR

TRANSMITTING

*A Report respecting the Removal of Obstructions to the
Navigation of the Sabine River.*

MAY 7, 1838.

Read, and laid upon the table.

DEPARTMENT OF WAR, May 5, 1838.

SIR: I have the honor to transmit, herewith, a report of the Commanding General of the army, which is accompanied by a copy of that of Major Belknap, "with respect to the removal of the obstructions to the navigation of the Sabine river," called for by a resolution of the House of Representatives of the 1st instant.

Very respectfully, your most obedient servant,

S. COOPER,
*Acting Secretary of War.*HON. JAMES K. POLK,
*Speaker of the House of Representatives.*HEADQUARTERS OF THE ARMY,
Washington, May 4, 1838.

SIR: In conformity with a resolution of the House of Representatives of the 1st instant, I herewith transmit a copy of the report of Major Belknap, of the 3d regiment of infantry, with respect to the removal of the obstructions to the navigation of the Sabine river, together with the accompanying papers and map, marked 1, 2, 3, and 4.

Very respectfully, sir, your obedient servant,

ALEX. MACOMB,
Major General, commanding in chief.

To the SECRETARY OF WAR.

PROPERTY OF
UNITED STATES GOVERNMENT
US-CE-S

CAMP ON THE SABINE LAKE,

Near the mouth of the Sabine river, (La.), March 24, 1838.

SIR: I have the honor to enclose, herewith, a sketch of the Sabine river, from Camp Sabine to the sea, together with a statement of the acting assistant quartermaster, showing the expense incurred in rendering it navigable for steamboats, and the copy of a letter from the master of the steamboat Velocipede, on making his first trip.

The chart of the lake and pass you will find to be somewhat different from the one furnished me from the Engineer department. This, however, is correct. It was made by Lieutenant J. H. Eaton, of the 2d infantry, after a most careful and minute examination.

I have the honor to be, sir, your obedient servant,

W. G. BELKNAP,
Major United States Army.

To Maj. Gen. A. MACOMB,
Commanding in chief U. S. A., Washington city.

No. 2.

SABINE PASS, March 23, 1838.

DEAR SIR: From your report of the navigation of the Sabine river, I have been induced to make the trial, with the steamboat Velocipede of 143 tons burden, (carpenter's measure,) 133 $\frac{3}{4}$ feet in length, 60 foot beam, with guards of 14 feet, drawing five feet water; and I am honored to inform you that I have succeeded in ascending and descending the river from the town of Sabine, a distance of about 300 miles, without the slightest injury to my boat.

Your success has been beyond the expectations of the oldest inhabitant on the river; and your labor has enhanced the value of all lands adjacent to the river at least two hundred per cent.

The raft, formerly considered impossible to be removed, I found no difficulty in ascending or descending.

The price of freight from *Natchitoches* to *Camp Sabine*, has herewith cost about five or six cents per pound; and by the *Sabine river*, from *New Orleans* to *Camp Sabine*, the freight will cost two cents per pound.

Yours, respectfully,

ISAAC WRIGHT.
Captain steamer *Velocipede*

Major BELKNAP.

No. 3

ASSISTANT QUARTERMASTER'S OFFICE,
Camp on Lake Sabine, (La.), March 24, 1838.

SIR: I have the honor to state to you, in compliance with your request that the expenses of the quartermaster's department, incurred by the clearing out and rendering navigable for steamboats, the Sabine river, were as follows, viz:

1st. For extra pay to the troops	\$ 893.42
2d. For articles expended, purchased by myself.....	36.65
3d. For articles expended, purchased by assistant quartermaster, Lieutenant E. B. Alexander, rough estimate	369.93
Total	<u>\$1,200.00</u>

In the estimate of articles purchased by Lieutenant Alexander, I have neither overrated the value.

I am, sir, very respectfully, your obedient servant,

A. G. BLANCHARD,

1st Lieut. 3d Infantry, Acting Assistant Quartermaster.

Major W. G. BELKNAP,
Commanding expedition.

